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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS [$250,000.00] MORE OR LESS,
Defendant,

and

THE STATE OF NEW YORK,
Defendant-Appellee,

and

REPUBLIC OF COLOMBIA,
Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,
Defendant-Appellant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 26, 1984

QUESTIONS PRESENTED

1. Are the Courts of the United States closed to a foreign government seeking to enforce its exchange control laws affirmatively by claiming the right to recover dollars which are here after having been smuggled out of the foreign country by one of its citizens in violation of those laws?

2. Even if the Courts of the United States are closed to a foreign government seeking to affirmatively enforce its exchange control laws by recovering here dollars smuggled out of the foreign country, are those Courts also closed to such a foreign government seeking only to defensively prevent one of its citizens from obtaining the smuggled dollars by legal action here?

3. Should U.S. Courts, in finding for a violator of the exchange control laws of another member of the International Monetary Fund, disregard treaty obligations which have been given "full force and effect in the United States" by a federal statute?

4. Is federal interpleader unavailable to the United States when one claimant is a foreign government seeking to control foreign exchange resources held by one of its citizens and another claimant is that citizen, who seeks to diminish those resources for his own purposes in contravention of the policies and objectives of his government?

5. Can a party who, without seeking a protective order, has ignored court ordered deposition dates, failed to produce documents as ordered and inadequately claimed an already waived privilege against self-incrimination nevertheless raise discovery objections on appeal, notwithstanding Rule 26(c) and the last sentence of Rule 37(d)?

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Galante v. Steel City Nat. Bank of Chicago, 66 Ill. App.3d 476, 384 N.E.2d 57 (Ill. App. Ct. 1978), *cert. denied*, 444 U.S. 841 (1979).

Greenberg v. CBS, 69 A.D.2d 693, 419 N.Y.S.2d 988 (2d Dept. 1979).

Independent Productions Corp. v. Loew's, Inc., 22 F.R.D. 266 (S.D.N.Y. 1958).

In re Gilboe, 699 F.2d 71 (2d Cir. 1983).

Isaacson v. N.Y.C. & H.R.R.R. Co., 94 N.Y. 278 (1884).

Koump v. Smith, 25 N.Y.2d 287, 303 N.Y.S.2d 858, 250 N.E.2d 857 (1969).

Levine v. Bornstein, 13 Misc. 2d 161, 174 N.Y.S.2d 574 (1958), *aff'd*, 7 A.D.2d 995, 183 N.Y.S.2d 868, *aff'd*, 6 N.Y.2d 892, 190 N.Y.S.2d 702, 160 N.E.2d 921 (1959).

Lyons v. Johnson et al., 415 F.2d 540 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970).

Malco Manufacturing Co. v. Elco Corp., 307 F. Supp. 1177 (E.D. Pa. 1969), *cert. denied*, 397 U.S. 1027 (1970).

Matter of Beeler v. Hildan Crown Container Corp., 26 A.D.2d 163, 271 N.Y.S.2d 373 (3d Dept. 1966).

Maxie v. Gimbel Bros. Inc., 102 Misc. 2d 296, 423 N.Y.S.2d 802 (N.Y. Sup. Ct., N.Y. Co. 1979)

ADDITIONAL CASES AND AUTHORITIES CITED IN SECOND CIRCUIT COURT BRIEF

Mertsching v. United States, 547 F. Supp. 124 (D. Colo 1982), *aff'd*, 704 F.2d 505 (10th Cir. 1983).

People v. Al-Kanani, 33 N.Y.2d 260, 351 N.Y.S.2d 969, 307 N.E.2d 43 (1973), *cert. denied*, 417 U.S. 916 (1974).

Prink v. Rockefeller Center, Inc., 48 N.Y.2d 309, 422 N.Y.S.2d 911, 398 N.E.2d 517 (1979).

Rockwood Computer Corp. v. Morris, 94 F.R.D. 64 (E.D.N.Y. 1982).

Rogers v. United States, 340 U.S. 367, *reh'g denied*, 341 U.S. 912 (1951).

Shelley v. Kraemer, 334 U.S. 1 (1948).

Sun Life Assurance Co. v. Klawans, 165 So. 2d 166 (1964).

United States v. Flanagan, 691 F.2d 116 (2d Cir. 1982).

United States et al. v. Fox, No. 83-6055 (2nd Cir. Oct. 19, 1983).

United States v. Rodriguez, 706 F.2d 31 (2d Cir. 1983).

Warsaw Convention on Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, art. 4(4), 49 Stat. 3000, T.S. 876.

Fed. R. Civ. P. 34(b).

Fed. R. Civ. P. 37(a).

Fed. R. Civ. P. 37(b).

Fed. R. Evid. 401.

Fed. R. Evid. 404(b).

Fed. R. Evid. 608(b).

ADDITIONAL CASES AND AUTHORITIES CITED IN SECOND CIRCUIT COURT BRIEF

Friedmann, *Foreign Exchange Control in American Courts*, 26 St. John's L. Rev. 97 (1951).

J. Gold, *The Fund Agreement in the Courts: Parts VIII-XI* (1976).

Gold, *The Fund Agreement in the Courts – XIV*, 26 International Monetary Fund Staff Papers 583 (1979).

Gove ed., *Webster's Third New International Dictionary (Unabridged)* (1964).

International Monetary Fund, *Annual Report of Executive Directors for Fiscal Year Ended April 30, 1949*, Appendix XIV (1949).

International Monetary Fund, *Exchange Arrangements & Exchange Restrictions, Annual Report 1983* (1983).

F. Mann, *The Legal Aspect of Money* 382 (2d ed. 1953), *quoted* in J. Gold, *The Fund Agreement in the Courts* (2d ed. 1953).

F. Mann, *The Legal Aspect of Money* (4th ed. 1982).

Williams, *Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement*, 15 Va. J. of Int'l L. 319 (1975).

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JURISDICTIONAL STATEMENT

The decision and opinion of the Court of Appeals for the Second Circuit was entered on May 17, 1984. A timely petition for rehearing in *banc* was denied on June 28, 1984. This petition for *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254 (1) and Rule 19 of the Rules of this Court.[1]

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals, not yet reported, appears in Appendix 1 hereto. The opinion of the District Court for the Eastern District of New York, reported at 98 F.R.D. 694 (1983), appears in Appendix 2 hereto. The earlier related opinion of the Second Circuit Court of Appeals, reported at 620 F.2d 322 (1980), appears in Appendix 4 hereto.

PROVISIONS OF TREATIES, STATUTES AND REGULATIONS

Treaty of Peace, Amity, Navigation and Commerce, December 12, 1846, United States-Colombia, 9 Stat. 881, T.S. No. 54, 6 Bevans 868:

Article 13

> Both contracting parties promise and engage formally to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial recourse, on the same terms which are usual and customary with the natives or citizens of the country; for which purpose they may either appear in proper person or employ

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1. The names of all parties to the proceedings in the Second Circuit Court of Appeals appear in the caption above. The State of New York withdrew its claim in interpleader by notice dated June 18, 1984, and is not a party in this Court.

in the prosecution or defense of their rights such advocates, solicitors, notaries, agents and factors as they may judge proper in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions or sentences of the tribunals, in all cases which may concern them, and likewise at the taking of all examinations and evidence which may be exhibited in the said trials.

International Monetary Fund Articles of Agreement, 60 Stat. 1401, T.I.A.S. 1501, 2 U.N.T.S. 39 (December 27, 1945), amended by 20 U.S.T. 2775, T.I.A.S. No. 6748, 726 U.N.T.S. 266 (May 31, 1968), amended by 29 U.S.T. 2203, T.I.A.S. No. 8937, _____U.N.T.S._____ (April 30, 1976):

Article VIII, Section 2

(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

Title 22, United States Code:

§ 286h. Status, privileges, and immunities of the United States

The provisions of article IX, sections 2 to 9, both inclusive, and the first sentence of article VIII, section 2(b), of the Articles of Agreement of the Fund, and the provisions of article VI, section 5(i), and article VII, sections 2 to 9, both inclusive, of the Articles of Agreement of the Bank, shall have full force and effect in the United States and its Territories and

possessions upon acceptance of membership by the United States in, and the establishment of, the Fund and the Bank, respectively.

Republic of Colombia Decree Law No. 444 of 1967:

Articles 4, 30, 31, 150 and 217-225 are set forth in Appendix 7 hereto.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the District Court for the Eastern District of New York was Title 28, United States Code, sections 1335 and 1345. *See* Complaint in Interpleader, paragraph 2.

Following repeated failures by Fonseca to comply with discovery requirements and to heed court orders, his claims were dismissed both in the interpleader action started by the United States and in the earlier action Fonseca had brought against the Secretary of the Treasury and other federal officials. The opinion of the District Court related the details of Fonseca's recalcitrance and found the

> extreme remedy [of dismissal] warranted by Fonseca's continuous failure to comply with valid orders of the court. While his original objections may have been made in good faith, his belated attempt to invoke the Fifth Amendment strikes the court as being dilatory and in bad faith and appears to be an attempt to avoid the discovery process. Because Fonseca has responded to this court's orders with contempt, and because there is no admission that he will begin to comply with this court's orders, the court finds that it has no choice but to dismiss his claim. No other result is recommended by Fonseca's behavior.

98 F.R.D. at 702-3. These characterizations pertained only to Fonseca's responses to the District Court's orders regarding interrogatories and document production. But

> the court must also dismiss his claims on the ground of his unexcused failure to appear in New York City for a court-ordered deposition. * * * Fonseca never raised any claim of privilege with respect to the

> deposition. * * * Because no valid excuse was given for Fonseca's failure to comply with this court's deposition order, the court will dismiss his claim in interpleader for this reason as well. This court finds that Fonseca has consistently ignored valid orders of this court to comply with the discovery requests.

Id. at 703.

The claims dismissed had been alleged as follows in Fonseca's answer and claim in interpleader: that he checked a suitcase containing $250,000 on a flight from Bogota, Colombia to Lima, Peru; that the bag was misdirected to JFK Airport, where U.S. Customs refused his lawyers' demands for it, whereupon he sued the concerned federal officials; that a request for transfer of the currency to Colombia as possible evidence of violation of Colombian exchange control law had been upheld by the District Court but reversed by the Second Circuit.

Colombia's answer and claim in interpleader alleged that its exchange control law required Colombian citizens like Fonseca to sell foreign currencies to the Central Bank (Banco de la Republica) in return for Colombian pesos, and that 22 U.S.C. § 286h, as well as treaty law (*i.e.*, the Articles of Agreement of the International Monetary Fund, part of the "Bretton Woods Agreement"), made unenforceable any contract Fonseca had to remove the currency from Colombia in violation of its exchange control laws.[2] Colombia, like the State of New York, also alleged a claim in the nature of escheat, and the United States in its Complaint in Interpleader stated that it "may have a claim to the defendant currency as abandoned property seized upon entry into the United States, if no other entity or person establishes good title and ownership of the currency."

Judgment was entered against Fonseca in August 1983 in his action against the Secretary of the Treasury et al. and in September 1983 in the U.S. Government's interpleader action, wherein judgment was refiled in October 1983 following the

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2. Fonseca relies on the alleged " 'enforceability' of the Fonseca/Avianca contract." Second Circuit Brief at 25.

filing by the District Court of an Order for Final Judgment pursuant to Fed. R. Civ. P. 54(b).

The Court of Appeals for the Second Circuit heard argument on February 3, 1984, and decided on May 17, 1984, to reverse the dismissal of Fonseca's claim in his own action and to order dismissal of the interpleader action. Certain of Fonseca's allegations, including the allegation that he had a baggage claim for the suitcase,[3] were held to "abundantly demonstrate Fonseca's right to possession." Slip op. 3751 at 3760. Discovery ordered by the District Court was held not to be required, despite Fonseca's failure to seek available procedural safeguards such as a protective order, because

> the information requested by appellees is not sufficiently relevant to the subject matter of the action to fall within the parameters of Fed. R. Civ. P. 26(b). A determination of "ownership" of the currency is not necessary to a proper resolution of the dispute. Further, the sought after discovery would not shed new light on the question of Fonseca's right to possession.

Id. at 3762. Without referring at all to Colombia's competing claim to the money, the Court said of the role played by the United States:

> We believe the government's conduct in this case is wholly unjustified since it initiated its interpleader action on a wrong legal premise and wrongly instituted it against a legitimate claimant.

Id. at 3763. If a "legitimate claimant" means one certain to win, it is not explained how the United States should have known *a priori*, without evidence or legal argument, that Fonseca was bound to prevail over Colombia.

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3. The Court called it "undisputed that Fonseca holds the baggage claim check corresponding to the number originally assigned to the suitcase," yet Colombia's Brief at 23 had noted that "no copy of any such receipt appears in the Joint Appendix," which at 115a merely showed a copy of a lost-baggage claim form referring by serial number to a baggage tag that is not in the record.

The United States and the State of New York were held by the Second Circuit to "have failed to demonstrate any colorable claim adverse to that of Fonseca, or even the presence of a legitimate individual claimant."[4] The Court went on to declare that

> Colombia's case is similary suspect. Although the Colombian Government may have a valid action against Fonseca for exporting currency in violation of its currency exchange control laws, it may not seek to develop the facts it needs to prove its case by use of discovery in the Courts of the United States. Instead, it should seek whatever redress it believes appropriate in the proper forum, once the money is returned to Fonseca.

The Court concluded by "warn[ing] once again against the misapplication of interpleader and irrelevant discovery" and by finding "no merit to appellees' remaining arguments." *Id.*

Colombia's petition to the Second Circuit for rehearing in *banc* argued that the Court's opinion might be read to deny Colombia access to U.S. Courts, a peculiar prospect when access thereto by Fonseca was guaranteed by the U.S.-Colombia treaty cited below; that the opinion seemed to accept as established Fonseca's allegations while ignoring those of Colombia; and that the opinion did not even mention 22 U.S.C. § 286h and the related treaty, the Bretton Woods Agreement. The petition for rehearing in *banc* was denied, hence this petition for a writ of *certiorari*.

REASONS FOR GRANTING THE WRIT

1) *The Second Circuit has decided important questions of federal law which have not been, but should be, settled by this Court.*

Explicitly or implicitly, the Second Circuit has decided in the affirmative the following important questions of federal law which have not been, but should be, settled by the Supreme Court:

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4. *Id.* at 3763. Whether the Court felt that the Republic of Colombia was less of a claimant because of its not being an "individual claimant" was not made clear.

1. Are the Courts of the United States closed to a foreign government seeking to enforce its exchange control laws affirmatively by claiming the right to recover dollars which are here after having been smuggled out of the foreign country by one of its citizens in violation of those laws?

2. Even if the Courts of the United States are closed to a foreign government seeking to affirmatively enforce its exchange control laws by recovering here dollars smuggled out of the foreign country, are those Courts also closed to such a foreign government seeking only to defensively prevent one of its citizens from obtaining the smuggled dollars by legal action here?

3. Should U.S. Courts, in finding for a violator of the exchange control laws of another member of the International Monetary Fund, disregard treaty obligations which have been given "full force and effect in the United States" by a federal statute?

4. Is federal interpleader unavailable to the United States when one claimant is a foreign government seeking to control foreign exchange resources held by one of its citizens and another claimant is that citizen, who seeks to diminish those resources for his own purposes in contravention of the policies and objectives of his own government?

Affirmative answers to these questions were given when the Second Circuit "di:ect[ed] the district court to ...dismiss the government's interpleader action", the only one of the two actions to which the Republic of Colombia was then a party, slip op. 3751 at 3754, [5] and later said:

> Although the Colombian Government may have a valid action against Fonseca for exporting currency in violation of its currency exchange control laws, it

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5. Colombia on July 20, 1984, served and filed a motion for leave to intervene in the other action, *Fonseca v. Regan, et al.*, in order to protect its position in case the Supreme Court should affirm the dismissal of the interpleader action but reverse the exclusion of Colombia from the Courts of the United States. The Second Circuit could have preserved Fonseca's claim by reversing its dismissal without affecting Colombia's right to present its opposing claim in the District Court.

> may not seek to develop the facts it needs to prove its case by use of discovery in the Courts of the United States. Instead, it should seek whatever redress it believes appropriate in the proper forum, once the money is returned to Fonseca.

Id. at 3763. It is not clear why the Court of Appeals felt that Colombia was seeking from the U.S. Courts only discovery and not also (a) to prevent Fonseca from completing the smuggling operation by getting the money and (b) to recover the money itself so as to enhance its foreign exchange resources and thus its balance of payments. Since Colombia in fact was and is seeking both (a) and (b), the Circuit Court's holding effectively excludes it from the Courts of the United States for both defensive and affirmative purposes.

This is harsh treatment for a friendly government, especially one (a) whose citizen-smuggler is simultaneously being welcomed into our courts and (b) with which we have a treaty opening the courts of each country to the other's citizens. Closing our "tribunals of justice" to a Colombian citizen like Fonseca would infringe the right of "judicial recourse" which his Government can demand for him under Article 13 of the applicable Treaty of Peace, Amity, Navigation, and Commerce. (December 12, 1846, United States-Colombia, 9 Stat. 881, T.S. No. 54, 6 Bevans 868.) That same Government should enjoy no less access to our Courts. No authority is cited by the Second Circuit as the basis on which any party (whether it be a sovereign state, a corporate entity or an individual) could be thus deprived of the right to have its case heard in the Courts of the United States.

The Republic of Colombia does have its own domestic remedies to apply against those who smuggle out valuable foreign exchange resources (see Appendix 7 hereto) but that possibility should not adversely affect Colombia's right to employ U.S. judicial remedies to pursue right here the smuggled currency itself (as differentiated from the wrongdoer), here in the Eastern District of New York where the currency was brought, here in what may well be the last place where the currency will be subject to judicial control. Applicable law, duly alleged

before the District Court[6] gives Colombia the right to both POSSESSION AND OWNERSHIP of the very same dollars themselves, in return for the equivalent in Colombian pesos. The implication in the Second Circuit's phrase "once the money is returned to Fonseca" that the money would, upon its recovery by Fonseca, necessarily go back to Colombia, where that Government could most effectively exercise its sovereign power, seems unfounded.

Through discovery, Colombia sought information from Fonseca relevant to Colombia's claim to both POSSESSION AND OWNERSHIP of the identical dollar currency under 22 U.S.C. § 286h, a provision of the Bretton Woods Agreement [7] and the Colombian exchange control laws set forth in part in Appendix 7 hereto. Such discovery was for the purpose of proving Colombia's case, not in Colombian courts but in the Eastern District of New York.

Fonseca effectively conceded that 22 U.S.C. § 286h and the Bretton Woods Agreement are at issue when his Second Circuit Brief referred at 21 to his

> admission, on which Colombia may rely, that he did not take the steps which Colombia alleges were required to comply with its currency control laws, thereby reducing this claim to a clear question of law and policy.

The "clear question" was not discussed on its merits in the Second Circuit's opinion, nor was the treaty or the federal statute even mentioned. Fonseca's Second Circuit Brief at 25 agreed

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6. See relevant provisions of Decree Law No. 444 of 1967 included herein at Appendix 7, especially the second sentence of Article 4 and Articles 30, 31 and 150.

7. International Monetary Fund Articles of Agreement, 60 Stat. 1401, T.I.A.S. 1501, 2 U.N.T.S. 39 (Dec. 27, 1945), amended by 20 U.S.T. 2775, T.I.A.S. No. 6748, 726 U.N.T.S. 266 (May 31, 1968), amended by 29 U.S.T. 2203, T.I.A.S. No. 8937, _____U.N.T.S._____ (April 30, 1976).

that among the issues framed by the pleadings is the " 'enforceability' of the Fonseca/Avianca contract". Fourteen pages of Colombia's Brief (19-33) were devoted to showing why that contract is not enforceable here because of the statute and treaty, an issue to which the Second Circuit made no reference beyond what is quoted above.

The issue of whether the Courts of the United States are closed to foreign governments seeking to assert, either affirmatively or defensively, violations of their exchange control laws has come only peripherally to the Supreme Court in three *certiorari* petitions, all of which were denied. *Banco do Brasil, S.A. v. A.C. Israel Commodity Co., Inc.*, 12 N.Y.2d 371, 239 N.Y.S.2d 872, 190 N.E.2d 235 (1963), *cert. denied*, 376 U.S. 906 (1964); *Banco Frances e Brasiliero v. Doe et al.*, 36 N.Y.2d 592, 370 N.Y.S.2d 534, 331 N.E.2d 502 (1975), *cert. denied*, 423 U.S. 867 (1975); and *Zeevi v. Grindlays Bank*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, *cert. denied*, 423 U.S. 866 (1975). In each of those cases, unlike the present case, there had been rulings by the New York Court of Appeals on the merits of various claims by governmental or non-governmental parties. Not raised by those *certiorari* petitions was the more drastic issue raised herein of whether such a foreign government is actually excluded from our courts and not entitled to a ruling on the merits of its claims, as the Second Circuit has now held.

In the first of these cases, *Banco do Brasil*, a foreign government agency failed in its damage suit against a New York importer for having violated that government's exchange control regulations. The New York Court of Appeals distinguished between the defensive and affirmative invocation of foreign exchange control laws:

> An obligation to withhold judicial assistance to secure the benefits of such contracts does not imply an obligation to impose tort penalties on those who have fully executed them.

12 N.Y.2d at 376. The "obligation" not to enforce "contracts" is based on the first sentence of Article VIII, Section 2 (b) of the Bretton Woods Agreement, which provides as follows:

> (b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

Section 286h of Title 22 of the U.S. Code confers "full force and effect in the United States" on the first sentence just quoted.

A technical problem, the "revenue law" rule, which swayed the *Banco do Brasil* Court, has no logical application to exchange controls and is in any event superceded by the statute and treaty. A statement in *Banco do Brasil* that "[p]laintiff is an instrumentality of the Government of Brazil and is seeking...to enforce what is clearly a revenue law", 12 N.Y.2d at 377, was questioned by the same court in *Banco Frances e Brasiliero*, 36 N.Y.2d at 599-600, where the "revenue law" problem was avoided by simply deeming the Brazilian bank to be a non-governmental entity. The New York court held the bank to be entitled to rescission of fraudulent conversions of cruzeiros into dollars, the net effect of which was to protect Brazil's foreign exchange resources just as effectively as if the claimant had been the Brazilian Government, as the dissenting judge pointed out:

> Nothing in the Bretton Woods Agreement Act or in any other agreement between the United States and Brazil of which we are aware, however, mandates a complete abrogation of the normal conflicts rule or requires our courts affirmatively to enforce foreign currency regulation, as we are invited to do in the present case. * * * I consider the plaintiff's complaint as an attempt to utilize the judicial machinery of our courts to enforce the exercise of the sovereign power by the Government of Brazil.

36 N.Y.2d at 602, 605. The majority, however, approved af-

firmative enforcement of a foreign government's exchange control laws, disposed of the "revenue law" notion and correctly identified the purpose and significance of exchange control laws:

> But even assuming the continuing validity of the revenue law rule and the correctness of the characterization of a currency exchange regulation thereunder, United States membership in the International Monetary Fund (IMF) makes inappropriate the refusal to entertain the instant claim. * * * Moreover, where a true governmental interest of a friendly nation is involved — and foreign currency reserves are of vital importance to a country plagued by balance of payments difficulties — the national policy of cooperation with Bretton Woods signatories is furthered by providing a State forum for suit.

36 N.Y. at 599. The Supreme Court's denial of *certiorari* to review these holdings should logically now be followed by the granting of *certiorari* to review the Second Circuit's inconsistent holdings in the present case.

In the third of the cases where *certiorari* was denied, *Zeevi v. Grindlays Bank*, the New York Court of Appeals refused to allow an anti-Israel edict of the Idi Amin dictatorship in Uganda to impede the validity of a letter of credit. The Court rested its decision on the basis that a letter of credit is not an "exchange contract" within the meaning of Article VIII, Section 2(b) of the Bretton Woods Agreement. Without doubt the Court was influenced by concern for the sanctity of letters of credit and New York's "pre-eminent financial position", 37 N.Y.2d at 227, as well as by reluctance to number among Uganda's legitimate exchange controls under Section 2(b) a central bank ban on "all payments to Israel companies and their agents, and to the Government of Israel" which was "typified by strong anti-Israel and anti-semitic suggestions made by Uganda's president." *Id.*

Earlier than its three decisions referred to above, the New York Court of Appeals had enforced defensively the exchange

control laws of a foreign government by declining to assist in their violation, even though U.S. relations with that government were cold and the losing party was a pensioner's widow. *Perutz v. Bohemian Discount Bank*, 304 N.Y. 533, 110 N.E.2d 6 (1953). Suit was brought to obtain out of dollars held by the bank in New York the equivalent of a pension owing in Czech crowns deposited in a blocked account in Prague. The Court said:

> A contract made in a foreign country by citizens thereof and intended by them to be there performed is governed by the law of that country.... Our courts may, however, refuse to give effect to a foreign law that is contrary to our public policy.... But the Czechoslovakian currency control laws in question cannot be deemed to be offensive on that score, since our Federal Government and the Czechoslovakian Government are members of the International Monetary Fund established by the Bretton Woods Agreement Act. (See U.S. Code, tit. 22, §286; *United States v. Pink*, 315 U.S. 203, 231.)

304 N.Y. at 537. A few years later the New York Court of Appeals said in dictum that Article VIII, Section 2(b) "unquestionably prevents the courts of this State from enforcing illegal transactions in the field of international currency exchange...." *Southwestern Shipping Corp. v. Nat. City Bank*, 6 N.Y.2d 454, 462, 190 N.Y.S.2d 352, 160 N.E.2d 836 (1959), *cert. denied*, 361 U.S. 895 (1959). To the same effect, the Director of the Office of Alien Property of the U.S. Department of Justice ruled that

> by adherence to the Agreement, the United States has taken the position that foreign currency controls are not inherently penal or confiscatory, and that recognition of such controls is not offensive to public policy.[8]

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8. *In the Matter of Heddy Brecher-Wolff*, Title Claim No. 41668, Docket No. 1698, *quoted in* J. Gold, *The Fund Agreement in the Courts* 79 (1962). Sir Joseph Gold is former General Counsel and Director of the Legal Department of the International Monetary Fund.

Entirely apart from the mandate of 22 U.S.C. §286h, U.S. membership in the International Monetary Fund precludes refusal by U.S. Courts on local policy grounds (such as any "revenue law" rule) to apply Colombian exchange control law to test the validity of Fonseca's contract with Avianca to export the dollars.

> [S]ection 2(b) has been superimposed upon private international law, as both official IMF interpretations and decisional authorities have held.

Williams, *Foreign Exchange Control Regulation and the New York Court of Appeals: J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 9 Cornell Int'l L.J. 239, 243 (1974). Even where the foreign government is hostile, the treaty prevails. "The Florida Courts are obligated by the International Monetary Fund Agreement to apply the cited Cuban laws to the contract here involved." *Confederation Life Ass'n v. Ugalde*, 164 So.2d 1,2 (Sup. Ct. Fla. 1964).

Issues such as whether the Fonseca/Avianca contract was an "exchange contract" and how Colombian pesos are "involved" in an illegal export of U.S. dollars were extensively dealt with in Colombia's Second Circuit Brief.[9] At the argument on February 3, 1984, counsel for Colombia handed up a letter from the Director of the Legal Department of the IMF, a copy of which is attached as Appendix 6 hereto, confirming that the relevant Colombian legal provisions are imposed and maintained consistently with the Fund Agreement.

In the variety of situations found in *Banco do Brasil, Banco Frances* and *Zeevi*, the Supreme Court denied *certiorari* to review decisions on the merits. On the more drastic related issue of whether our courts are actually closed to such claims, as the Second Circuit held herein, so that such claims will not even be entertained and ruled on, the Supreme Court appears not

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9. For example: "Thus the purchase of Italian hemp for English pounds involves lire as well as pounds, since the export sale of hemp produces an Italian exchange resource and directly relates to the international value of Italian lire." Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 82 Yale L.J. 867, 888 (1953).

to have been approached. This Court should avail itself of the present opportunity for clarification, especially in view of a 1983 District Court case which further obscured the enforceability of the exchange control laws of foreign countries, *Libra Bank Limited, et al. v. Banco Nacional de Costa Rica, S.A.*, 570 F. Supp. 870 (S.D.N.Y. 1983). In the Southern District Court's opinion declining to alter its previous grant of summary judgment to the plaintiff,

> [t]he court concludes that [1] this loan agreement is not an exchange contract and that the Bretton Woods Agreement is inapplicable. [2] Assuming *arguendo* that the loan agreement is an exchange contract, defendant has not persuaded this court that an intervening change in a foreign currency regulations rendering a contract unenforceable is within the scope of Article VIII, Section 2(b). [3] Finally, defendant has not demonstrated that their currency regulations were imposed consistently with the Fund Agreement.

570 F. Supp. at 902. Any one of the three grounds stated, if valid, would have sufficed to justify the decision, the second being the most supportable and not related to the present case. The third ground does not apply here because of the IMF ruling, Appendix 6 hereto.

The *Libra* court's first ground, that a syndicated bank loan agreement repayable in dollars in the United States is not an "exchange contract", was the most controversial of its three grounds. Were it not for the manner of stating it quoted above, it might have been taken as intended for dictum. The facts in *Libra*relevant to the "exchange contract" issue, as indicated partly in the related decision in *Allied Bank Intern. v. Banco Credito Agricola*, 566 F. Supp. 1440 (S.D.N.Y. 1983), show clear distinctions between the banking transactions at issue in that case and the smuggling of foreign currency involved in the present case. A syndicate from various countries loaned U.S. Dollars to Banco Nacional in New York, repayable in U.S. Dollars in New York subject to New York law and the jurisdiction of New York's courts, and repayment was to have been out of the foreign currency proceeds of the sugar and sugar product exports financed by the loan.

The narrow construction of the words "exchange contracts" employed by the New York Court of Appeals in *Banco do Brasil* and *Zeevi* evidently influenced the Southern District despite the fact that these words appear in a treaty (Article VIII, Section 2(b) of the Bretton Woods Agreement) on whose interpretation federal courts should take the lead. This is the type of issue where, to avoid inconsistencies among various state rulings, "our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 , 425 (1964). The Supreme Court has specifically declared the primacy of the Bretton Woods Agreement over state law policies:

> [T]he power to make policy with regard to such matters is a national one from the compulsion of both necessity and our Constitution.

Kolovrat v. Oregon, 366 U.S. 187 (1961).

Unless there are other federal court decisions involving Article VIII, Section 2(b) beyond those mentioned above, the federal law on these important questions of statutory and treaty construction rests for the moment on the Second Circuit's ruling herein, one unappealed District Court case and several denials of *certiorari*. It is respectfully submitted that such is not a satisfactory state of the law and that the present petition for *certiorari* should be granted so as to provide needed clarification, not only for the present litigants but for all other parties now or in the future concerned with the enforceability in U.S. Courts, whether defensively or affirmatively, of the exchange control laws of foreign countries. Especially important is the affirmance or reversal of the Second Circuit's holding that a foreign government cannot even be heard on the merits in United States Courts regarding a case brought by its own law-breaking citizen, particularly where the exclusion may negate the possibility of meaningful litigation anywhere to protect valuable foreign exchange resources.

2) *The decision below conflicts with decisions of other Federal Courts of Appeals.*

The Second Circuit cites no authority other than Rule 26(b) and *Dunbar v. United States*, 502 F.2d 506 (5th Cir. 1974), to support its reversing a dismissal based on both defiance of court-ordered discovery and failure to appear for a deposition without having first obtained the protective order required by Rule 37(d). *Dunbar* involved no Rule 37(d) sanction for failure to appear, only a 37(b) sanction for failure to answer interrogatories as ordered. Nor did *Dunbar* involve any competing claimant like Colombia, which, under both statutory and treaty law, is seeking to assert its right to protect its supply of foreign currency from the smuggler Fonseca in order to put its reserves of foreign currency (otherwise known as "foreign exchange") to uses required for the national good rather than to those selected by private parties for their own ends.

Dunbar was not followed by the Fifth Circuit in *Romari Corporation v. United States*, 531 F.2d 296 (5th Cir. 1976), where, unlike the present case, plaintiff corporation's president did appear and answer questions at a deposition but where, as in the present case, no protective order was sought under Rule 26(c) for questions which the president chose not to answer. The Fifth Circuit in *Phillips v. Insurance Co. of N. America*, 633 F.2d 1165 (5th Cir. 1981),

> conclude[d] on a cautionary note. The discovery process is by and large extrajudicial. In cases of recalcitrance, the district court is empowered under Rule 37 to enter an order compelling discovery. Such an order is to be scrupulously obeyed by the parties; if, however, reasonable questions that are insoluble by the parties arise, they should be directed to the district court.

633 F.2d at 1168.

Other circuits in comparable situations approve dismissals, or even affirmative judgments for claimants, against non-discovering parties. *Hindmon v. National - Ben Franklin Life Ins. Corp.*, 677 F.2d 617 (7th Cir. 1982) and cases cited therein at 621-2; and *Davis v. Fendler*, 650 F.2d 1154 (9th Cir. 1981).

The Seventh Circuit in *Hindmon* approved not only the dismissal of plaintiff but the entry of a substantial judgment in favor of the defendant on its counterclaim. The District Court's order that plaintiff appear on a certain day to be deposed was complied with only on a later day and for an arbitrarily limited amount of time, these liberties being taken without a protective order as the Circuit Court noted, 677 F.2d at 619 and 621. In addition, as in the present case, interrogatory answers were signed by counsel, not by the plaintiff as required. Like Fonseca,

> [d]espite this warning, Hindmon failed to appear for his deposition on the appointed date, failed to properly answer defendant's Interrogatories, and failed to respond to defendant's Request for Production within the time limit set by the district court.

Id. at 620. As in this case, "the district court made specific factual findings regarding Hindmon's lack of good faith and willful failure to cooperate in the discovery process." *Id.* These findings "are binding on this court unless clearly erroneous." *Id.* at 621. As in the present case,

> Hindmon's refusal to appear for his deposition on its scheduled date, as well as his submission, more than four months after the required time for response, of incomplete and improperly executed Answers to Interrogatories provide independent grounds for the imposition of sanctions under Federal Rule of Civil Procedure 37(d).

Id. The last sentence of Rule 37(d), quoted below, should govern, if federal discovery is not to become chaotic:

> The failure to [appear for deposition, answer or object to interrogatories, or respond to requests for inspection] may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

The Ninth Circuit in *Davis* approved not just a default judgment against the defendant but the entry of judgment in favor of the plaintiff, despite the defendant's having sought a protective order, which Fonseca did not do, and where the defendant attempted tardily to plead self-incrimination, which Fonseca also attempted. Said the Ninth Circuit:

> Generally, in the absence of an extension of time or good cause, the failure to object to interrogatories within the time fixed by Rule 33, FRCivP, constitutes a waiver of any objection. This is true even of an objection that the information sought is privileged.

650 F.2d at 1160.

Given Fonseca's unashamed flouting of judicial authority, the words of warning from this Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), *reh'g denied*, 429 U.S. 874 (1976), apply with special urgency here:

> [A]s in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. *** other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

427 U.S. at 639.

The present *certiorari* petition provides an opportunity to renew and refine this warning to recalcitrant litigants, as well as to define the extent to which observance is due by U.S. Government authorities, including the Judicial Branch, of foreign laws buttressed by treaty and act of Congress and designed to alleviate the balance of payment problems that today threaten international financial stability.

CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the decision of the Second Circuit.

Respectfully submitted,

JOHN CAREY
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200 Park Avenue,
New York, New York 10166
Counsel for Petitioner

July 26, 1984

APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 670—August Term, 1983
(Argued February 3, 1984 Decided May 17, 1984)
Docket No. 83-6266

JOSE A. FONSECA,

Plaintiff-Appellant,

—against—

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES, et al.,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00) MORE OR LESS,

Defendant,

and

REPUBLIC OF COLOMBIA and THE STATE OF NEW YORK,

Defendants-Appellees,

and

JOSE A. FONSECA,

Defendant-Appellant.

Before:

LUMBARD, OAKES and CARDAMONE,

Circuit Judges.

Appeal from two judgments entered in the United States District Court for the Eastern District of New York, Mark A.

Costantino, *Judge*, the first dismissing appellant's petition for mandamus to recover a misdirected suitcase and its contents and the second dismissing his interpleader claim to the suitcase.

Reversed and remanded.

EDWARD S. RUDOFSKY, New York, New York (Zane and Rudofsky, New York, New York, of Counsel), *for Appellant Fonseca.*

BERYL R. JONES, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Raymond J. Dearie, United States Attorney for the Eastern District of New York, Robert L. Begleiter, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York, of Counsel), *for Appellee United States.*

JOHN CAREY, New York, New York (Coudert Brothers, New York, New York, of Counsel), *for Defendant-Appellee Republic of Colombia.*

AUGUST L. FIETKAU, Assistant Attorney General, New York, New York (Robert Abrams, Attorney General of the State of New York, Melvyn R. Leventhal, Deputy Assistant Attorney General, Richard Liskov, Assistant Attorney General, New York, New York, of Counsel), *for Appellee State of New York.*

CARDAMONE, *Circuit Judge:*

This appeal involves plaintiff Jose A. Fonseca's five and one-half year struggle to recover a misdirected suitcase and its contents—$250,000—from the United States Government. Fonseca seeks relief from two judgments rendered against him in the United States District Court for the Eastern District of New York (Costantino, J.), the first dismissing with prejudice his claim for mandamus relief under 28 U.S.C. § 1361 and the second disposing of his interpleader claim in the same fashion. In essence, these judgments hold Fonseca in default for failing

to respond to interrogatories and document requests and neglecting to appear at a scheduled deposition.

We reverse and remand, directing the district court to reinstate Fonseca's complaint and dismiss the government's interpleader action.

I. *BACKGROUND*

On June 9, 1978 Fonseca purchased a ticket to fly from Bogota, Colombia to Lima, Peru on Avianca Airlines. Upon arrival at the Bogota airport, plaintiff checked his suitcase through to Lima and obtained the customary baggage claim check. When Fonseca arrived in Lima his suitcase was missing. Avianca had apparently misdirected it to the Pan American Airlines terminal at John F. Kennedy International Airport in New York. When the suitcase was not claimed there, United States Customs officials at JFK seized it, and upon opening it discovered $250,000 in U.S. currency packed inside.

Fonseca eventually discovered his suitcase's whereabouts and, acting through a New York attorney, requested that the Customs Service return it to him. When this request was denied, Fonseca commenced an action in the district court to compel the money's return. He also retained the services of the Wolf D. Barth Company ("Barth"), licensed customs brokers. Barth prepared and filed with the Customs Service all of the papers and documents, including a bond and carrier certificate, necessary to obtain release of the currency. Normally, Customs would have approved the application and released the currency as a routine matter, but in this case, at the behest of the Regional Counsel's Office, they refused to do so. The refusal touched off the following series of events.

On December 12, 1978 Fonseca filed an amended complaint that alleged compliance with the customs requirements of 19 C.F.R. §§ 141 and 143 and sought mandamus relief pursuant to 28 U.S.C. § 1361. The United States responded by serving interrogatories on Fonseca through his local counsel. At that

point Fonseca moved to obtain an order directing immediate return of the suitcase and its contents. Meanwhile, the Superintendent of Exchange Control of the Republic of Colombia requested that the money be delivered to him in connection with an investigation his office was conducting to determine whether Fonseca had violated Colombian laws governing currency exchange control. Acting on this request, the United States Attorney applied for a court order directing delivery of the currency to the Colombian Superintendent pursuant to 28 U.S.C. § 1782. At an evidentiary hearing held in connection with these motions, the district court held that the Superintendent was a "tribunal" within the meaning of § 1782, ordered delivery of the money to the Superintendent and then proceeded to dismiss Fonseca's complaint. On appeal we held to the contrary, finding that the Superintendent was not a tribunal but only a law enforcement official. Accordingly, we reversed the order below and reinstated Fonseca's complaint. *Fonseca v. Blumenthal*, 620 F.2d 322, 323-24 (2d Cir. 1980) (per curiam).

Before the district court could decide the case on remand, the United States filed a second action, in interpleader, *see* 28 U.S.C. § 1335, to determine the owner of the suitcase and money. Fonseca, the Republic of Colombia and the State of New York filed claims to the money. Then, the government served a second set of interrogatories on Fonseca inquiring as to his past and present addresses, past and present identification and travel documents and the nature of his employment. Plaintiff objected to these interrogatories, claiming that the questions were irrelevant. On February 4, 1982 the district court ordered Fonseca to answer the interrogatories, yet plaintiff refused to comply.

Colombia, having previously filed a claim to the money, joined the legal controversy on April 14, 1982 when its attorneys served Fonseca's local counsel with interrogatories and a request for documents respecting the interpleader action. Later, Colombia supplemented these efforts with another request for documents and a notice of deposition to take place in New York on June 28, 1982. The information sought encompassed all of the topics covered by the United States' interrogatories as well as addi-

tional ones relating to the source, ownership and manner of Fonseca's obtaining the currency, the purpose and particulars of transporting the currency into and out of Colombia and Fonseca's noncompliance with Colombia's currency control laws. The plaintiff did not appear for the deposition, nor did he supply the requested documents; and, although he filed answers to the interrogatories on July 6, Colombia asserted that he answered improperly. Thus, Colombia moved pursuant to Fed. R. Civ. P. 37(d) for an order to strike Fonseca's pleadings and pursuant to Fed. R. Civ. P. 34(b) and 37(a) to compel document inspection or to direct a deposition within 60 days, compel document production and compel proper answers to interrogatories.

The district court granted this motion and directed Fonseca to appear in New York for a deposition on October 5. Fonseca refused to comply. Instead, he claimed that he might be a target of criminal investigations both here and in Colombia and could invoke his Fifth Amendment privilege as a ground for refusing to answer these interrogatories. A week later Colombia again moved, this time for an order to strike Fonseca's pleadings and for default judgment against him. The United States and New York State joined in the motion, and on November 10 the district court heard another round of oral arguments. In a written decision and order, Judge Costantino found no valid excuse for Fonseca's failure to comply with his earlier orders regarding the deposition, interrogatories and document production. Therefore, on account of Fonseca's defaults, the trial court dismissed Fonseca's claim for mandamus relief as well as his interpleader claim.

On appeal, Fonseca argues as he did before the district court that the crucial issue in this case is not his "ownership" of the suitcase and its contents, but rather his right to the return of the property. Thus, he continues, discovery motions going to the issue of ownership should have been deemed irrelevant. Fonseca further contends that he has a right to the suitcase and its contents because he holds the baggage claim check and has otherwise completely complied with applicable Customs regulations. Finding considerable merit to these arguments, we reverse the judgments of the district court and remand with

instructions to it to reinstate Fonseca's complaint and dismiss the government's interpleader action.

II. *ANALYSIS*

Rule 37 of the Federal Rules of Civil Procedure provides generally for sanctions against parties who unjustifiably resist discovery, the most severe of which are dismissal and judgment by default pursuant to Rule 37(b)(2)(C). District courts have broad discretion to invoke these sanctions, *see, e.g., Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir. 1974), and the scope of appellate review is focused on whether the trial court managed its affairs within the permissible range of its discretion, *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962), in light of the entire record in the case. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (*per curiam*). Here, where the information sought is not properly discoverable, it is axiomatic that a district court should not impose a Rule 37 sanction for a party's failure to comply with an order to reveal such information.

The basic rule governing the permissible scope of discovery, Fed. R. Civ. P. 26(b), provides in pertinent part that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Thus, the crucial issue in this case is whether the interrogatories, documents sought and likely topics at deposition were "relevant to the subject matter involved"—*i.e.*, Fonseca's right to the return of the currency.

Although we have had little occasion to write on this point, the Fifth Circuit's opinion in *Dunbar v. United States*, 502 F.2d 506 (5th Cir. 1974), is particularly instructive. In that case claimant Dunbar sent a package to a friend through the United States mails. Inside the package was $21,500 in cash. On the outside was written the mailing address of the law firm at which Dunbar's friend worked. Although Dunbar included his own name and return address and his friend's mailing address, he neglected to include his friend's name on the outside of the

package. When the package arrived at the law firm, a senior partner, unapprised of the intended recipient, opened it and discovered the money. Dunbar's friend subsequently informed the partner that she was the intended addressee, but he refused to give her the cash and instead contacted the United States Attorney's Office. That Office persuaded the lawyer to turn the package over to the Federal Bureau of Investigation which, upon receipt of the package, undertook an investigation of Dunbar.

Even though the FBI found no evidence of criminal activity, it refused to return the package to Dunbar despite his entreaties and the clearly marked return address. Dunbar, therefore, relying on certain postal regulations, filed a complaint against the government in which he sought a writ of mandamus to compel return of the money. Claiming that it was uncertain whether plaintiff owned the cash or even that he was the "Dunbar" in question, the government served him with interrogatories pursuant to Fed. R. Civ. P. 33. Dunbar responded to most of the interrogatories but refused to answer two that dealt with the purposes for sending the package and the specifics surrounding acquisition of the money. Upon motion, the district court ordered Dunbar to answer the interrogatories or have his claim dismissed. When the government later filed an interpleader action against all parties with possible claims to the package and Dunbar persisted in refusing to answer the interrogatories, the district court dismissed his claim under Rule 37 and entered a default judgment.

On appeal, the Fifth Circuit reversed the district court, reinstated Dunbar's complaint and dismissed the interpleader action. The court rejected the government's argument that ownership of the package was crucial and that the interrogatories pertaining to ownership were relevant. *Dunbar, supra*, 502 F.2d at 509-10. Instead, it concluded that under the applicable postal regulations, which required return of the package to its sender, Dunbar need show only that he was the sender, not the owner. *Id.* at 509. Finally, the court warned against the government's use of "cosmic interpleader," especially where it failed to

demonstrate the existence of any colorable claim adverse to that of the plaintiff. *Id.* at 511-12.

Apart from the different settings, we see little to distinguish *Dunbar* from the present case. Appellees contend that their interrogatories and other discovery devices are relevant because they go to the issue of ownership, which they believe is critical to a determination of Fonseca's claim, and that there is some doubt as to whether Fonseca actually owns the currency. In particular, they argue that the existence of another "Jose Fonseca" with the same Colombian identification number as plaintiff somehow precludes plaintiff's recovery.

This line of reasoning, quite similar to the one advanced and ultimately rejected in *Dunbar*, entirely misses the point. Ownership of the currency is not the issue in this case. Thus Fonseca may not be required to allege ownership in his complaint or prove it in an interpleader action. *See Dunbar*, *supra*, 502 F.2d at 509. The real matter at issue in this case is Fonseca's right to *possession* (*i.e.*, return of the currency). From the pleadings, affidavits and exhibits, it is undisputed that Fonseca holds the baggage claim check corresponding to the number originally assigned to the suitcase, has given an accurate description of the suitcase and its contents, and has entered and filed the necessary customs documents pursuant to 19 C.F.R. §§ 141 and 143. These particulars abundantly demonstrate Fonseca's right to possession.

Under general principles of law—just as under the established customs of the railroad and airline industries—the holder of a baggage claim check is ordinarily entitled to the return of the checked baggage. *See, e.g., Isaacson v. New York Central & Hudson River Railroad Co.*, 94 N.Y. 278, 282-84 (1884); *Cohen v. Varig Airlines, S.A.*, 85 Misc.2d 653, 655-57 (N.Y. Civ. Ct. 1975), *modified on other grounds*, 88 Misc.2d 998 (Sup. Ct., App. Term 1976), *modified on other grounds*, 62 A.D.2d 324 (1st Dept. 1978). Put another way, the fact of the loss of the luggage in transit does not affect the claim check holder's power to reclaim it, *United States v. Williams*, 503 F.2d 50, 53 (6th Cir. 1974), since control of the baggage claim ticket constitutes constructive possession of the baggage. *See United States v.*

Jackson, 588 F.2d 1046, 1057 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979); *United States v. Catano*, 553 F.2d 497, 500 n.3 (5th Cir. 1977); *United States v. Ogden*, 484 F.2d 1274, 1274-75 (9th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974); *United States v. Pardo-Bolland*, 348 F.2d 316, 324 (2d Cir.), *cert. denied*, 382 U.S. 944 (1965); *United States v. Madalone*, 492 F. Supp., 916, 919 (S.D. Fla. 1980); *State v. Carroll*, 111 Ariz. 216, 526 P.2d 1238, 1240 (1974) (en banc); *State v. Trowbridge*, 157 Mont. 527, 487 P.2d 530 (1971); *State v. Mejia*, 257 La. 310, 242 So.2d 525, 531 (1970). From this it appears beyond doubt that when Fonseca presented his baggage claim check and accurately described the suitcase and its contents, he had a right to expect that the suitcase would be immediately returned to him.

Appellees' further argument, seeking to cast doubt on Fonseca's identity by contending that there exists another "Jose Fonseca," is simply clutching at straws. Even were it true, this revelation neither defeats Fonseca's claim nor makes relevant appellees' discovery. Somewhere in Colombia another Jose Fonseca may well exist, but only the one now before us has laid claim to the currency and proferred the baggage claim check. The sum at stake—$250,000—is sufficiently large that one might fairly wonder why during the past six years this other Jose Fonseca has not asserted his own claim. Silence from that quarter speaks louder than appellees' argument.

Moreover, the United States Government need not fear that by releasing the currency it subjects itself to liability for misdelivery. Fonseca retained a licensed customs broker that on his behalf filed with the Customs Service all the requisite papers and documents, including a bond. These measures should adequately protect the United States against unforeseen liability—liability that in any event appears baseless. In fact, Fonseca's compliance with 19 C.F.R. §§ 141 and 143 substantiates his right to possession of the suitcase. Just as the postal service normally returns unaddressed packages to their senders, Customs normally approves applications like Fonseca's as a matter of course.

Finally, we find that the information requested by appellees is not sufficiently relevant to the subject matter of the action to

fall within the parameters of Fed. R. Civ. P. 26(b). A determination of "ownership" of the currency is not necessary to a proper resolution of the dispute. Further, the sought after discovery would not shed new light on the question of Fonseca's right to possession. The proposed interrogatories, for example, inquired into Fonseca's past and present addresses, his identification documents, the nature of his employment and the circumstances surrounding his acquisition of the money. As the Fifth Circuit commented in *Dunbar, supra,* 502 F.2d at 510, appellees' interrogatories "might have interesting answers, [but] they are not so germane to the conduct of the instant lawsuit that the plaintiff must answer them or face the sanctions of Rule 37."

III. *CONCLUSION*

We believe the government's conduct in this case is wholly unjustified since it initiated its interpleader action on a wrong legal premise and wrongly instituted it against a legitimate claimant. This becomes even clearer in light of the concession that the amount of money found in the suitcase is irrelevant to the government's authority to seize it. That is to say, the government suggests that it may capriciously seize a misdirected suitcase—whether it contains $250,000, $25 or merely nothing—refuse to return it to a party claiming rightful possession and then compel that party to undergo the burden of costly litigation and unwarranted discovery.

The United States and the State of New York have failed to demonstrate any colorable claim adverse to that of Fonseca, or even the presence of a legitimate individual claimant. Since the suitcase arrived in this country fortuitously, either of these claimants would be unjustly enriched if they could successfully lay claim to a portion of the $250,000. Colombia's case is similarly suspect. Although the Colombian Government may have a valid action against Fonseca for exporting currency in violation of its currency exchange laws, it may not seek to develop the facts it needs to prove its case by use of discovery in the Courts

of the United States. Instead, it should seek whatever redress it believes appropriate in the proper forum, once the money is returned to Fonseca.

Rather than chide appellees further for what we perceive to be abuses of their authority and of the judicial process, we think it should suffice to warn once again against the misapplication of interpleader and irrelevant discovery. Since there is no merit to appellees' remaining arguments, the order of the district court is reversed and the case remanded for further proceedings consistent with this opinion.

APPENDIX 2

JOSE A. FONSECA,

Plaintiff,

v.

DONALD T. REGAN,* SECRETARY OF THE TREASURY, et al.,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS (250,000.00), MORE OR LESS, et al.,

Defendants.

Nos. 78-C-1907, CV-81-3542.

United States District Court,
E.D. New York.

Aug. 4, 1983.

Raymond J. Dearie, U.S. Atty., E.D.N.Y. by Beryl R. Jones, Asst. U.S. Atty., Brooklyn, N.Y., for U.S. and Donald T. Regan.

Coudert Brothers by John Carey, New York City, for Republic of Colombia.

Robert Abrams, Atty. Gen. by August L. Fietkau, Asst. Atty. Gen., New York City, for State of N.Y.

Axelrod & Warburgh by Paul E. Warburgh, Jr., and Zane and Rudofsky, by Edward S. Rudofsky and Jay L.T. Breakstone, New York City, for Jose A. Fonseca.

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* When this action was commenced, W. Michael Blumenthal, then the Secretary of the Treasury, was named as the lead defendant. The court now orders, pursuant to Fed. R. Civ. P. 25(d), that the caption be changed to reflect the fact that Donald T. Regan is now the Secretary of the Treasury.

MEMORANDUM OF DECISION AND ORDER

COSTANTINO, District Judge.

These cases are before the court on the motions of the Republic of Colombia ("Colombia"), the United States, and the State of New York to dismiss Jose A. Fonseca as a party to the second action, and on the defendants' motion to dismiss the first action. For the reasons set forth below, the motions are hereby granted to the extent hereinafter indicated.

According to the pleadings, on or about June 9, 1978, Fonseca bought a ticket on Avianca Airlines to fly from Bogota, Colombia to Lima, Peru. When he arrived at the Bogota airport for his flight, Fonseca checked his baggage on Avianca for transport to Lima. However, Avianca delivered the baggage to New York, where it arrived at John F. Kennedy International Airport unaccompanied by Fonseca, who was waiting for it in Lima. When the suitcase was not claimed in New York, the United States Customs Service seized and opened it. Approximately $250,000 in U.S. currency was found inside the suitcase.

Acting through a New York attorney, Fonseca requested that the Customs Service return the money. When the request was denied, Fonseca commenced the first action (78-C-1907) to compel return of the money. The United States government served interrogatories on Fonseca through his local counsel. Before responding to the interrogatories, Fonseca moved for an order directing the government to return the suitcase and the money. Thereafter, acting pursuant to a request by the Superintendent of Exchange of Colombia (the Superintendent), the government moved for an order directing that the money be delivered to the Superintendent pursuant to 28 U.S.C. § 1782. After holding an evidentiary hearing, this court found that the Superintendent was a "tribunal" within the meaning of § 1782, ordered that the money be delivered to him, and dismissed Fonesca's suit. On appeal, the Second Circuit reversed this holding and remanded the case for further proceedings. *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980) (per curiam).

On October 29, 1981, the United States filed the second action (CV-81-3542) in interpleader to determine the owner of the suitcase and money. 28 U.S.C. § 1335. Fonseca, Colombia, and the State of New York filed claims to the money. Shortly after the second action was commenced, the United States served on Fonseca a second set of interrogatories in the first action.[1] Fonseca, the plaintiff in the first action, objected to the interrogatories essentially claiming that the questions were irrelevant; Fonseca did not make any claim of privilege in his objection. On February 4, 1982, this court entered an order directing Fonseca to respond to the interrogatories and to comply with Civil Rule 1 of the Eastern District of New York within 21 days.[2] Fonseca has never complied with this order.

On April 14, 1982, attorneys for Colombia served Fonseca's local counsel with interrogatories and a request for production of documents in the second action. Fonseca's answers to the interrogatories were filed on July 6, 1982. Prior to receipt of these answers, Colombia sent Fonseca's local counsel a notice of deposition and another request for production of documents. The deposition of Fonseca was to take place in New York City on June 28, 1982. Fonseca's counsel sought to have Fonseca deposed in Colombia, but counsel for Colombia refused. Fonseca failed to appear for his deposition and failed to supply the requested documents.

On July 27, 1982, Colombia moved to strike Fonseca's pleadings pursuant to Fed. R. Civ. P. 37(d) on the grounds that

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[1] The first set of interrogatories served on Fonseca by the government in 78-C-1907 was never answered.

[2] Civil Rule 1 of the Eastern District of New York reads:

A party shall furnish to any other party, within five days after demand, a verified statement setting forth his post office address and residence, and, if a corporation, the names, post office addresses and residences of its principal officers. In the case of an assigned claim, the statement shall include the post office address and residence of the original owner of the claim and of any assignee thereof. Upon non-compliance with the demand, the court, on *ex parte* application, shall order the furnishing of the statement, and in a proper case, on motion, may direct that the proceedings on the part of the non-complying party be stayed, or make such other order as justice requires.

Fonseca failed to appear at his deposition and that he did not properly answer the interrogatories,[3] and moved for an order pursuant to Fed. R. Civ. P. 34(b) and 37(a) compelling inspection of the documents or for an order directing the deposition of Fonseca within 60 days and compelling proper answers to the interrogatories and production of the requested documents.

After hearing oral argument on Colombia's motion, this court entered an order on August 20, 1982, directing Fonseca to appear on October 5, 1982, in New York for a deposition and to respond fully to the interrogatories and produce the documents on or prior to September 13, 1982. Fonseca failed to comply with this court's order: he failed to appear for the deposition, he failed to supply any documents, and, instead of responding to the interrogatories, he filed an affidavit claiming that he believed that he may be a target of criminal investigations in the United States and Colombia and he therefore declined to make any further response to the interrogatories by invoking his Fifth Amendment right against self-incrimination.

On October 13, 1982, Colombia moved to strike Fonseca's pleadings and to enter default judgment against him. New York State and the United States joined in Colombia's motion. Oral argument on the motions was heard on November 10, 1982. After a thorough review of the entire record in these cases, this court now dismisses the first action and strikes Fonseca's pleadings and enters default judgment against him in the interpleader action. Colombia's motion is denied to the extent that it seeks to have Fonseca pay reasonable expenses and attorney's fees.

Fonseca argues first that because his motion in the first action to compel the government to return the money has never been opposed by the United States this court should grant the motion and order the money returned to him. At oral argument on November 10, 1982, however, the government clearly indicated its opposition to Fonseca's motion (Hearing Transcript, p. 11). Fonseca's contention also ignores the fact that the filing of the

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[3] Fonseca's answers to the interrogatories will be discussed below at 698-699.

interpleader action by the government served, in effect, as the response to Fonseca's motion in the first action.

The first action was filed to determine Fonseca's right to the money. The interpleader action was intended to accomplish the same. The difference between the two actions is that the second action will determine the ownership of the money with finality by adjudicating the claims of all the parties to the currency. If Fonseca were to prevail in the second action, his claim to the money would be established as against the other claimants. If he were to win the first action, Fonseca would still face suits by the other claimants. A second action to determine the claims of Colombia and New York State would waste judicial resources. In addition, a court could later determine that Colombia or New York State should be entitled to the money; if the United States has already paid the fund out to Fonseca, it could be subject to multiple liability. The avoidance of multiple suits and of multiple liability based on a specific, limited fund proffered by the plaintiff constitutes the basic purpose of the interpleader statute. *Libby, McNeill, and Libby v. City Nat. Bank*, 592 F.2d 504, 509 (9th Cir. 1978); *Zellen v. Second New Haven Bank*, 454 F.Supp. 1359, 1365 (D.Conn. (1978); *Massachusetts Mut. Life Ins. Co. v. Central-Penn. Nat. Bank*, 362 F.Supp. 1398, 1401 (E.D.Pa. 1973).

Once an interpleader action has been commenced, "a district court may . . . enter its order restraining [the claimants] from . . . prosecuting any proceeding in any . . . United States court affecting the property . . . involved in the interpleader action. . . ." 28 U.S.C. § 2361. This section empowers a district court to insure that all claims to the fund involved be settled in the single interpleader action.

Because both actions have been pending before this court, it has not been necessary to enjoin the proceedings in the first action. But it is clear that Fonseca must win the interpleader action to succeed in the first action. If Fonseca loses in the interpleader action, then it would be improper to permit the first action to proceed since it might render the government

liable to Fonseca as well as the successful interpleader claimant. Thus, if Fonseca's claim in the second action is dismissed, his claim in the first action should also be dismissed as an "appropriate" method of enforcing the judgment against him in the interpleader action. 28 U.S.C. § 2361.

Therefore, even if the United States had never specifically opposed Fonseca's motion in the first action, the filing of the interpleader action was, in effect, a response to that motion. In fact, after the second action was commenced, Fonseca appears to have treated the first action as moot—his only filing in that action after the interpleader action was begun has been an objection to the government's interrogatories.[4]

Since Fonseca must succeed in the interpleader action in order to be entitled to the currency, this court's attention will be focused on the issues raised by the motions in that action. If Fonseca is dismissed as a claimant therein, then his motion in the first action must be denied and his claim therein must likewise be dismissed.[5]

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[4] It should be noted that even before the government filed the interpleader action Fonseca appears to have lost interest in the first action: he did not renew his motion for an order to return the money; he failed to respond to a motion by Colombia to intervene which was mooted by the second action and Colombia's claim therein; he claims, however, to have filed his bill for costs of his appeal in *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980), which would have been his only filing in the first action between remand and the start of the interpleader action. The record in this court does not contain the bill of costs, although the record on remand does contain a bill filed with the clerk of the Court of Appeals.

[5] Because the outcome of the first action will be determined by the holding in the interpleader action, Fonseca's claim that the United States may not oppose his motion in the first action because it failed to satisfy Fonseca's bill of costs for his appeal need not be addressed. This court moves however that the power to stay litigation or submissions pending payment of costs is discretionary, not mandatory as Fonseca claims. *See Matter of Hartford Textile Corp.*, 681 F.2d 895 n. 1 (2d Cir.1982) (per curiam). The court notes further that Fonseca has never moved this court for an order directing the government to pay the costs, which amount to $1753.97. Additionally, neither the record nor the docket show that Fonseca has filed the claim for costs with this court (see note 4, *supra*).

The first argument made by Colombia[6] is that Fonseca's claim in the second action should be dismissed because of his failure to answer the interrogatories pursuant to an order of this court.

In its interrogatories filed on April 16, 1982, Colombia requested that Fonseca provide his residential addresses since 1975, information concerning his identification number and identity card issued by Colombia, information concerning any aliases Fonseca has used, and varied information concerning the events surrounding the shipment of the currency to the United States. Colombia also requested certain documents relating to Fonseca's identity and the shipment of the money. Several of the interrogatories (10, 11, 12, and 13) and two of the document requests (4 and 5) may have been designed to elicit information that might be incriminating.

In response to these demands, Fonseca provided a present address but objected to providing any other addresses as irrelevant; he objected to providing any information about his employment as irrelevant; he also refused to supply information about his identity card or identification number claiming it to be irrelevant. As far as the questions concerning receipt and shipment of the money by Fonseca, he declined to answer on relevancy grounds except to admit that he brought the money into Colombia from Venezuela.[7] Oddly, Fonseca admitted in response to interrogatories 12 and 13 that he never offered to sell the money to the Bank of Colombia in exchange for pesos and that he never applied for an exchange license pursuant to

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[6] Although the United States and New York State have joined in the motion, the court will refer only to Colombia as the moving party.

[7] Interrogatories 10 and 11 and Fonseca's answers thereto read:

[10] Describe the manner in which the currency was transported into Colombia, including by whom, from where, and on what date the currency was transported into Colombia.

[Answer] The money was transported by defendant FONSECA on or about June 7, 1978 from Venezuela; otherwise, objection as to relevance.

[11] Describe the purpose or purposes for which defendant Jose A. Fonseca obtained the currency.

[Answer] [Objection as to relevancy.]

Colombian Decree-Law 444 of 1967.[8] Although the court has not been made aware of whether these omissions are criminal, these answers seem to be the most likely to incriminate Fonseca. Yet no objection was made nor any privilege claimed for interrogatories 12 and 13. As to the document requests, Fonseca claimed either that the documents sought were irrelevant to his claim (1, 2, and 3) or that he did not possess the requested documents (4 and 5).

The court further notes that the form of the answers did not comply with Fed.R.Civ.P. 33(a) because they were neither made under oath nor signed by Fonseca. Thus, even the one attempt Fonseca made to comply with discovery was improper.

After receiving the answers, Colombia made its motion to strike Fonseca's pleadings for, *inter alia*, failing to answer the interrogatories properly. Fonseca claimed in response that the requested information was irrelevant to determining the issue of his entitlement to the money. Colombia charges that the person claiming the money is not, in fact, Jose A. Fonseca. It alleges that the "real" Jose A. Fonseca lost his identity card and that the claimant herein is an imposter using Fonseca's name. Colombia argues that the claimant must be prepared to submit to the interrogatories in order to help determine the validity of his claim. The United States, joining in the motion, maintains that it owes an affirmative duty to insure that the money is returned to the appropriate party.

Fonseca's response has been that the name under which he chooses to claim the money is not relevant. He claims that none of the other parties has disputed that it was Fonseca the claimant

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[8] Interrogatories 12 and 13 and Fonseca's answers thereto read:

[12] Did defendant Jose A. Fonseca, or any person owning or possessing the currency ever offer to sell it to the Bank of the Republic of Colombia for Colombian pesos? If so, identify each and every such offer, and any documents relating thereto.

[Answer] No.

[13] Did defendant Jose A. Fonseca ever apply for or obtain an exchange license pursuant to Decree-Law No. 444 of 1967 of the Republic of Colombia? If so, identify each and every such application and license.

[Answer] No.

who in fact checked his suitcase with Avianca. So long as no party denies that he sent the money, he maintains that he is entitled to it, and it makes no difference whether he calls himself Jose A. Fonseca or John Doe when he makes his claim.

He also claims that the other interrogatories were likewise irrelevant to the issue of whether the money is his and should be returned to him.

After hearing oral argument, the court disagreed with Fonseca's contentions but provided him another opportunity to comply with discovery and ordered him to answer the interrogatories properly and completely in light of the following considerations: first, the answers would assist the court in insuring that the proper result would eventually be reached; and, second, that the purpose of the discovery rules would be best served by Fonseca's full answers.[9]

The name or title any claimant chooses to use is not relevant to the issue of the validity of the claim asserted by that claimant; however, in refusing to answer the interrogatories, Fonseca has created a situation wherein the other claimants are unable to obtain sufficient facts to oppose Fonseca's claim effectively. If the claim cannot be opposed effectively by virtue of Fonseca's obstinacy, then the adversary process is undermined. Thus, the court ordered compliance with discovery to enable the other claimants to frame the issues and to brief the court fully in this matter.

The order was also fully consistent with the principles and goals that underlie the discovery provisions of the Federal Rules of Civil Procedure. The basic purpose of interrogatories is to discover facts under oath or learn where facts may be discovered and to narrow the issues in the case for trial. *Life Music, Inc. v. Broadcast Music, Inc.*, 41 F.R.D. 16, 26 (S.D.N.Y.1966); *United States v. 216 Bottles, More or Less, etc.*, 36 F.R.D. 695, 701 (E.D.N.Y.1965); *United States v. Grinnell Corp.*, 30 F.R.D. 358, 361 (D.R.I.1962). If a party objects to interrogatories, the

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[9] At the time of its decision the court had not yet been made aware of any claim of privilege.

burden falls on that party to convince the court that the interrogatories are improper and need not be answered. *See Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292 (E.D. Pa. 1980); *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 260 (N.D. Ill. 1979).

Fonseca has not met his burden in the instant case. The questions are clearly designed to establish whether the claimant Fonseca is entitled to the currency. The questions were therefore germane to the issue in the case, and were not burdensome. Given these factors and Fonseca's burden of persuasion, the court held that the questions were relevant and had to be answered.

This same analysis is applicable to document requests one, two, and three. If information contained in documents is relevant to the subject matter of the litigation, it is generally discoverable. *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir.1980); *In re Penn Central Commercial Paper Litigation*, 61 F.R.D. 453 (S.D.N.Y. 1973). Since the court found these documents relevant, they had to be turned over absent a claim of privilege, which did not exist at the time of the order to produce the documents. Since no documents existed for requests four and five, none could be produced, and this court's order for production did not apply to these requests.

In summary, the court finds that the interrogatories asked relevant questions and that the documents sought were relevant. The court therefore reaffirms the validity of its underlying order to compel answers and the production of documents.

It was only after the court ordered him to comply in full to the discovery requests that Fonseca claimed that his answers might incriminate him and that he was possibly being investigated by American and Colombian authorities. Fonseca's claim of privilege under the Fifth Amendment was not made in any specific manner in response to any specific question; he invoked a blanket privilege and did not make it more specific. The court holds that by not invoking his Fifth Amendment privilege sooner, Fonseca waived the defense.

We note first that the Fifth Amendment is not self-executing, and its privilege against self-incrimination can be waived if it is not asserted in a timely fashion. *Maness v. Meyers*, 419 U.S. 449, 466, 95 S.Ct. 584, 595, 42 L.Ed.2d 574 (1975); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir.1981). Rule 33 provides that an objection to interrogatories must be made within 30 days, and, in the absence of an extension or good cause, failure to meet this time limit constitutes a waiver of an objection, including the assertion of a privilege. *Davis v. Fendler*, 650 F.2d at 1160.

Not only was the claim of privilege waived, but it was improperly asserted as well. It is well-established that the Fifth Amendment may be invoked in a civil proceeding, *Kastigar v. United States*, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972), and applies to interrogatories. *United States v. Kordel*, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970). The validity of the assertion of the Fifth Amendment privilege "hinges not on the witness's say so alone: the trial judge must determine whether the witness's silence is justified." *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir.1983); *Davis v. Fendler*, 650 F.2d at 1159.

Fonseca's attempt to invoke a blanket assertion of his Fifth Amendment privilege is not a proper invocation of the privilege. The Second Circuit has recently warned against accepting a blanket assertion of a Fifth Amendment claim. *United States v. Rodriguez*, 706 F.2d 31, 37 (2d Cir.1983) (Pierce, J.). Other courts have likewise refused to condone blanket assertions of the privilege. *See Davis v. Fendler, supra; Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969); *see also Mertsching v. United States*, 547 F.Supp. 124 (D.Colo.1982); *compare Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir.1979) (dismissal for failure to answer four of 34 interrogatories reversed). Blanket assertions of Fifth Amendment privilege are to be looked upon with disfavor because a trial judge cannot determine the validity of the claim unless it is invoked in response to specific questions from which the court can infer a particularized fear of self-incrimination. As the Second Circuit reminded us in *United States v. Rodriguez*, 706 F.2d at 36, the assertion of the Fifth Amend-

ment must be "grounded on a reasonable fear of danger of prosecution." A blanket assertion can preclude a judge from deciding whether the fear of prosecution is "reasonable" or "realistic," see *Rodriguez*, 706 F.2d at 36-37, as is the court's duty. *Bathalter, supra.*

The blanket assertion of a privilege, however, may be proper if the threat of self-incrimination is clearly evident from the circumstances. If not evident, then the party asserting the privilege bears the burden of showing that his answers may incriminate him. "A proper assertion of a Fifth Amendment privilege requires, at a minimum, a good faith effort to provide the trial judge with sufficient information from which he can make an intelligent evaluation of the claim." *Davis v. Fendler*, 650 F.2d at 1160. In the case at bar, Fonseca has submitted no information other than his belief that he was a possible target of criminal investigations in the United States and Colombia. He has provided no evidence to support his belief. Even if there were some crime of which Fonseca might be accused in the United States, it does not appear to be one for which he could be extradited from Colombia. See 57 Stat. 824 (1943); 26 Stat. 1534 (1888). Additionally, if Fonseca fears prosecution for an extraditable offense such as embezzlement, larceny, or narcotics violations, Colombia would not be bound to deliver him up to the United States since he is a Colombian citizen. Article X, 26 Stat. 1534 (1888). The court finds that Fonseca has failed to carry his burden of showing that he might incriminate himself by his answers to the interrogatories. We find, instead, that Fonseca's blanket assertion of his Fifth Amendment privilege to the entire discovery request is improper. For these reasons, the court finds that Fonseca's claim of privilege is waived. *See Mertsching v. United States*, 547 F.Supp. 124 (D.Colo.1982).[10]

Fonseca further asserts his fear that his answers to the interrogatories may incriminate him in a Colombian prosecution. It

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[10] Because of these findings, the court does not address the issue of whether, as a claimant in an interpleader action, Fonseca should be considered a plaintiff or defendant, and whether this makes any difference to his failure to comply with discovery orders. *See Mertsching v. United States*, 547 F.Supp. 124 (D.Colo.1982).

is an open question as to whether the Fifth Amendment privilege against self-incrimination may be invoked where the witness fears incrimination in a foreign country. *See Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478-81, 92 S.Ct. 1670, 1675-76, 32 L.Ed.2d 234 (1972). The Second Circuit has recently set forth guidelines for evaluating such claims, and this court will weigh Fonseca's claims against the test established in *United States v. Flanagan*, 691 F.2d 116 (2d Cir.1982) and reaffirmed in *In re Gilboe*, 699 F.2d 71 (2d Cir.1983).

In *Flanagan*, 691 F.2d at 121, the Second Circuit held that when resolving the issue of the propriety of a claim of privilege against a foreign prosecution a trial court must "focus on such questions as whether there is an existing or potential foreign prosecution of [the witness]; what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; whether there is a likelihood that his testimony given here would be disclosed to the foreign government."

To begin with, there are no pending charges against Fonseca in Colombia or any other country apparent from the record. In fact, there is no evidence other than Fonseca's statement that he "may be" the target of an investigation. There is, in sum, no evidence at all that he is about to be charged with any crime. In addition, the questions in the interrogatories are not designed to secure evidence which might be incriminating. *See In re Gilboe*, 699 F.2d at 76. The questions that were possibly the most incriminating were answered before Fonseca's assertion of privilege.

It is also not clear what crimes Fonseca could be charged with. Although he has admitted violating Colombian Decree-Law 444 of 1967, it is not clear whether this violation is criminal. It is not obvious from the record what other crimes Fonseca might be accused of in Colombia. Because these possible charges are not evident to the court, the burden of showing possible incrimination must rest with Fonseca. *See Davis v. Fendler*, 650

F.2d at 1160. Because Fonseca has submitted nothing except his own conclusory statement to show possible harm, the court concludes that he has not met his burden. Because the court perceives no charges that might result from or be furthered by Fonseca's responses, the court concludes that the first three factors all weigh against Fonseca's assertion of privilege. The court does not address the other factors of the *Flanagan* test, since the court finds no possible harm to Fonseca from his responses. Thus, even if the court did not deem Fonseca's claim of privilege waived, an application of the *Flanagan* test to the instant facts also leads to this court's rejection of Fonseca's privilege claim as to a possible prosecution in Columbia.

Having held that Fonseca waived his Fifth Amendment right against self-incrimination, and that, even if not waived, the assertion was improper, the court must determine an appropriate remedy. Accordingly, after considering the alternatives the court grants Colombia's motion to strike Fonseca's pleadings and enter default judgment against him. The court finds this extreme remedy warranted by Fonseca's continuous failure to comply with valid orders of this court. While his original objections may have been made in good faith, his belated attempt to invoke the Fifth Amendment strikes the court as being dilatory and in bad faith and appears to be an attempt to avoid the discovery process. Because Fonseca has responsed to this court's orders with contempt, and because there is no admission that he will begin to comply with this court's orders, the court finds that it has no choice but to dismiss his claim. No other result is recommended by Fonseca's behavior. Because the court is dismissing Fonseca's claim in interpleader, it must also dismiss his original suit against the government for the reasons discussed above.

In addition to dismissing Fonseca's claims for failure to comply with this court's order to answer the interrogatories and produce the documents requested, the court must also dismiss his claims on the ground of his unexcused failure to appear in New York City for a court-ordered deposition. The court did not consider the burden on Fonseca to be too great, since he would have had to come to the district for the eventual trial of

this matter. Therefore, the court ordered Fonseca to New York for the deposition. Fonseca did not comply with this order.

Fonseca never raised any claim of privilege with respect to the deposition. His only objection was that it was inconvenient for him to come to New York. But the court took Fonseca's convenience into account when deciding where the deposition should be held, and decided that it would be best to have Fonseca come to New York. Having lost on this issue the first time it was before the court, Fonseca chose to ignore the order and continue to stand on his objection.

Because no valid excuse was given for Fonseca's failure to comply with this court's deposition order, the court will dismiss his claim in interpleader for this reason as well. This court finds that Fonseca has consistently ignored valid orders of this court to comply with the discovery requests.

For the foregoing reasons, the court grants the motion of the government in 78-C-1907, *Fonseca v. Regan*, and dismisses the action with prejudice, and grants the motion of Colombia, joined in by the United States and the State of New York, to strike Fonseca's pleadings and enter default judgment against him, thereby dismissing his claim in interpleader in CV-81-3542, *United States v. United States Currency*. The motion by Colombia for fees and costs, however, is denied. Any outstanding motions that Fonseca has in either action are denied *pro forma*.

The remaining parties to the interpleader action, the United States, Colombia, and the State of New York are directed to appear before this court on Tuesday, September 13, 1983 at 10 o'clock a.m. for the next pre-trial conference.

So ordered.

APPENDIX 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00), MORE OR LESS; JOSE A. FONSECA; REPUBLIC OF COLOMBIA; AND THE STATE OF NEW YORK,

Defendant.

81-CIV-3542 (MAC)
Order for Final Judgment

This is to certify, pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, that the undersigned hereby directs the entry of a final judgment upon the memorandum of decision and the order herein entered August 5, 1983, granting the motion of defendant Republic of Colombia, joined in by plaintiff United States of America and by defendant State of New York, to strike defendant Jose A. Fonseca's pleading and enter default judgment against him, thereby dismissing his claim in interpleader, and the undersigned expressly determines that there is no just reason for delay since a) such dismissal of defendant Jose A. Fonseca's claim was on a basis having no relation to the relative merits of the other parties' claims, and b) delaying the appeal might result in two separate trials below, one at this time among the other three parties and another following a subsequent reversal of Fonseca's dismissal, and accordingly the undersigned expressly directs the reentry of the judgment entered herein on September 30, 1983, as constituting compliance with and satisfaction of this Order.

Dated: Oct. 17, 1983

/s/Mark A. Costantino
United States District Judge

Consented to:

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by /s/_____

of counsel to
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00), MORE OR LESS, ET AL.,

Defendants.

JUDGMENT

81-CIV-3542

A memorandum of decision and order of Honorable Mark A. Costantino, United States District Judge, having been filed on August 4, 1983, granting the motion to strike the pleadings of defendant Jose A. Fonseca and to enter default judgment against him, thereby dismissing his claim in interpleader herein, for the reasons given in such memorandum of decision and order filed on August 4, 1983, it is

ORDERED and ADJUDGED that judgment is hereby entered in favor of defendants Republic of Colombia and State of New York and in favor of plaintiff United States of America against defendant Jose A. Fonesca dismissing with prejudice his claim in interpleader.

ROBERT C. HEINEMANN
Clerk of the Court

by /s/Steve B. Sheinwald
Deputy Clerk

Dates: Brooklyn, New York
October 25, 1983

APPENDIX 4

JOSE A. FONSECA,

Plaintiff-Appellant,

v.

W. MICHAEL BLUMENTHAL, Secretary of the Treasury of the United States, et al.,

Defendants-Appellees.

No. 526, Docket 79-6174.

United States Court of Appeals,
Second Circuit.

Submitted Dec. 18, 1979.
Decided Feb. 21, 1980.

Edward S. Rudofsky, New York City (Zane & Teitler, and Axelrod & Warburgh, New York City, on the brief), for plaintiff-appellant.

Ralph L. McMurry, Asst. U.S. Atty., Brooklyn, N.Y. (Edward R. Korman, U.S. Atty., and Miles M. Tepper, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), for defendants-appellees.

Before KAUFMAN, Chief Judge, and SMITH and TIMBERS, Circuit Judges.*

PER CURIAM:

Appellant, Jose A. Fonseca, commenced this action in the Eastern District of New York to recover a suitcase containing $250,000 in United States currency. He alleged that the suitcase had been misdirected by an airline to JFK Airport in New York while Fonseca was traveling from Bogota, Colombia to Lima,

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* Pursuant to § 0.14 of the Rules of this Court, this appeal is being determined by Chief Judge Kaufman and Judge Timbers who are in agreement on this opinion. Judge Smith, who was on the panel that received the case on submission, unfortunately died on February 16, 1980. Prior to his death Judge Smith voted to reverse and remand and was in agreement with his colleagues on all issues in the case. He did not have the opportunity, however, to see this opinion prior to his death.

Peru. The suitcase was seized by the United States Customs Service in New York.

While the action was pending, the Superintendent of Exchange Control of the Republic of Colombia requested that the suitcase and its contents be delivered to him for examination in connection with an investigation to determine if Fonseca had violated Colombian laws governing exchange control. The United States Attorney for the Eastern District of New York moved for a court order that the suitcase be delivered to the Superintendent pursuant to 28 U.S.C. § 1782 (1976) which provides in relevant part:

> "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court."

Fonseca in the meanwhile moved for an order directing the government to return the suitcase and money to him.

An evidentiary hearing was held to determine the status and function of the Superintendent of Exchange Control under Colombian law. The district court thereafter ordered that the suitcase and its contents be delivered to the Superintendent pursuant to § 1782, and dismissed Fonseca's complaint. Fonseca has appealed from the district court's order.

We find that the dispositive issue on appeal is whether the Superintendent is a "tribunal" within the meaning of § 1782. We holds that he is not.

The term "tribunal" as it is used in § 1782 was first construed by our Court in *In re Letters Rogatory Issued by Director of Inspection of Government of India*, 385 F.2d 1017 (2 Cir. 1967)

(Friendly, J.), where the legislative history of the section was fully considered. *Id.* at 1018-21.

Earlier statutes designed to provide judicial assistance in foreign proceedings had authorized the district court to take the deposition of a witness for use in a "suit for the recovery of money or property [pending] in any court in any foreign country", 12 Stat. 769 (1863), "in any civil action pending in any court in a foreign country", 62 Stat. 949 (1948), and in any "judicial proceeding" pending in any court in a foreign country, 63 Stat. 103 (1949).

In 1964, § 1782 was amended to provide for obtaining testimony or documents for use "in a proceeding in a foreign or international tribunal." The word "tribunal" was used deliberately "to make it clear that assistance is not confined to proceedings before conventional courts . . . [but extends to] proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court." H.R.Rep. No. 1052, 88th Cong., 1st Sess. 9 (1963); S.Rep. No. 1580, 88th Cong., 2d Sess.; [1964] U.S.Code Cong. & Ad.News, pp. 3782, 3788, *quoted in In re Letters Rogatory (India), supra*, 385 F.2d at 1019.

As we pointed out in *India*, "[w]hile Congress materially expanded the scope of 28 U.S.C. § 1782 in 1964, it did not go to the full extent of authorizing a district court to execute letters rogatory whenever requested by a foreign country or a party there. . . ." *In re Letters Rogatory (India), supra*, 385 F.2d at 1020. It is evident that Congress intended "tribunal" to have an adjudicatory connotation.

We also observed in *India* that one concern of Congress in amending § 1782 in 1964 was to insure judicial assistance for French *juges d'instruction*. The *juge* is roughly equivalent to our grand jury. It is he who determines whether evidence against an individual charged with a major crime is sufficient to require him to stand trial. *Id.*

Although the *juge* directs the investigation, he represents "neither the interest of the police nor that of the state prosecu-

tors". Anton, L'Instruction Criminelle, 9 Am.J. Comp.L. 441, 443 (1960), *quoted in In re Letters Rogatory (India), supra*, 385 F.2d at 1020. In determining whether to proceed to trial, the government and the accused each are represented to an equal degree before the *juge*. "[H]is aim is simply to ensure that justice is done." *Id.* This is the hallmark of a tribunal—impartial adjudication.

Unlike the *juges d'instruction*, the Superintendent of Exchange Control is charged to act in the government's interest to enforce the law. He is required to protect the balance of payments by restraining the outward flow of capital from Colombia. He has extraordinary powers to order and conduct far-reaching investigations. Upon completion of his investigation, he is empowered to determine whether violation of the law has occurred. Although the subject of an investigation may be represented by counsel, the government's sole representative is the Superintendent himself.

The essence of the Superintendent's responsibility is the direction of a law enforcement agency. Unlike the *juge*, he has what Judge Friendly referred to in *India* as "an institutional interest in a particular result." *In re Letters Rogatory (India), supra*, 385 F.2d at 1020. This interest is inconsistent with the concept of impartial adjudication intended by the term "tribunal".

We therefore hold that the district court erred in concluding that the Superintendent of Exchange Control is a "tribunal" within the meaning of § 1782. In so holding, we do not express or imply any adverse reflection on the Superintendent or his legitimate function under Colombian law. Rather, our holding is compelled by the terms of § 1782 as enacted by Congress.

In view of our holding above, we find it neither necessary nor appropriate to reach any of the other issues raised on this appeal.

The order of the district court is reversed and the case is remanded to the district court to proceed with plaintiff's action according to law.

Reversed and remanded.

APPENDIX 5

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of June one thousand nine hundred and eighty-four.

JOSE A. FONSECA,

Planitiff-Appellant,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES, et al.,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00) MORE OR LESS,

Defendant.

and

REPUBLIC OF COLOMBIA and THE STATE OF NEW YORK,

Defendants-Appellees,

and

JOSE A. FONSECA,

Defendant-Appellant.

No. 83-6266
Filed June 28 1984

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-Appellee, Republic of Colombia,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____
Elaine B. Goldsmith
Clerk

APPENDIX 6

INTERNATIONAL MONETARY FUND
Washington, D.C. 20431

Cable Address
Interfund

Jan. 25, 1984

Dear Mr. Carey:
This letter is in reply to your letter of January 9, 1984 inquiring whether specified provisions of Colombian law are imposed or maintained consistently with the Articles of Agreement of the Fund.

I hereby confirm that the Colombian legal provisions referred to in your letter, to the extent they are applied to require the surrender of foreign exchange to Colombia's Central Bank, are imposed and maintained consistently with the Articles of Agreement of the Fund.

Very truly yours,
/s/ _____
George P. Nicoletopoulos
Director
Legal Department

Mr. John Carey
Coudert Brothers
200 Park Avenue
New York, N.Y. 10166

COUDERT BROTHERS
ATTORNEYS AND COUNSELLORS AT LAW
200 PARK AVENUE
NEW YORK, N.Y. 10166

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PARIS, 75008 FRANCE 52 Avenue des Champs-Elysees LONDON, EC4V 5AA ENGLAND 4 Dean's Court BRUSSELS, B-1050 BELGIUM 149 Avenue Louise, Box 8 HONG KONG Alexandra House, 20 Chater Road SINGAPORE, 0106 5 Shenton Way RIYADH, SAUDI ARABIA Law Office of Hussein El-Sayed, Suite 515, Saudi Real Estate Building, Sitteen Street, P.O. Box 2700 TOKYO, 107 JAPAN Tanaka & Takahashi, New Aoyama Building W-1352, 1-1, Minami Aoyama 1-chome Minato-ku RIO DE JANEIRO, 20,000 BRAZIL Ulhoa Canto, Rezende, Neviani e Guerra, Avenida Almirante Barroso 81

January 9, 1984

EXPRESS MAIL

The Secretary
International Monetary Fund
700 19th Street, N.W.
Washington, D.C. 20431

Re: United States of America v. U.S. currency et al., U.S. Court of Appeals, Second Circuit No. 83-6266

Dear Sir:

In connection with the above appeal, which concerns the removal of U.S. $250,000 in bank notes from the territory of our client Republic of Colombia without its permission, we would like to request the assistance of the International Monetary Fund with regard to the clarification of whether certain requirements of Colombian law are maintained or imposed consistently with the Articles of Agreement of the International Monetary Fund under Article VIII Section 2(b) of this Agreement.

Articles 4,30,31, 150 and 217-225 of Colombian Decree Law No. 444 of 1967 establish and specify the obligation to surrender foreign exchange to the Central Bank of Colombia.

Therefore, we wish to request the Fund to indicate whether a Colombian legal provision, to the extent it is applied to require that all foreign exchange be surrendered to the Central Bank, is imposed or maintained consistently with the Articles of Agreement of the Fund.

Yours sincerely,
/s/ _____
John Carey

JC:mr

APPENDIX 7

(Translation from Spanish Provided by Petitioner)

DECREE-LAW No. 444 OF 1967
(March 22)

On the international exchange and foreign trade system THE PRESIDENT OF THE REPUBLIC OF COLOMBIA Exercising the extraordinary powers vested in him by Law 6 of 1967.

DECREES:

CHAPTER I
GENERAL PROVISIONS
***

Article 4.- Possession and negotiation of gold and foreign exchange shall be regulated by the provisions of this Decree.

With the exceptions herein provided, all incoming foreign exchange shall be sold to the Bank of the Republic or shall be exchanged by this institution for "exchange certificates", as the case may be.

Foreign exchange may be acquired only for economically or socially useful purposes as defined by this Statute, once the covering foreign exchange license has been granted.

***

CHAPTER II
***
SECTION THREE
POSSESSION OF FOREIGN EXCHANGE

Article 30.- Save for the exceptions authorized by this Decree, only the Bank of the Republic shall be allowed to accept deposits in foreign currency.

Article 31.- Foreign exchange corresponding to foreign exchange deposits that individuals or entities residing in Colombia had set up with credit institutions in the country or abroad prior to Decree 2867,1966 shall be sold to the Bank of the Republic at the capital market rate, or invested in the bonds provided for in article 251 hereof, within the terms established by the Monetary Board, bearing in mind, among other factors, the nature of the different types of deposits.

Save for exceptions established by the Monetary Board, foreign exchange arising from the sale or liquidation of shares, bonds, participations in investment funds and, in general, all types of securities in foreign currency denominations as well as the proceeds from the transfer of other personal or real property possessed abroad by residents in Colombia shall be sold to the Bank of the Republic or invested in said bonds.

To make sure that the provisions of the foregoing paragraph are complied with, the goods to which it refers, as well as any assignment or disposal thereof, shall be registered with the Office of Exchange whenever this has not been done pursuant to Decree 2867,1966, within the terms and in the manner determined by said Office.

***

CHAPTER VIII
CONTROL OF CAPITAL

***

SECTION FIVE
Donations in Foreign Currency

Article 150.- Donations in foreign currency to individuals or organizations residing in Colombia shall be sold to the Bank of the Republic at the capital market rate.

If it is agreed with the donor that all or part of the foreign exchange is to be applied to certain expenses in foreign currency, the Office of Exchange may exempt the donee from the obligation of the preceding paragraph, provided the expenses

are useful to the country and are previously registered with the said Office.

***

CHAPTER XII
FOREIGN EXCHANGE AND TRADE ORGANIZATIONS

***

SECTION THREE
Prefecture [now Superintendency] of Exchange Control

***

Article 217.- It shall be the duty of the [Superintendency of] Exchange Control to:

a) See that the provisions governing the control of gold and foreign exchange are complied with;

b) Request from official entities general or particular reports which it may deem necessary for the performance of its duties;

c) Undertake any action, search or investigation which may be considered necessary to prove that violations of the regulations under its surveillance have occurred. For this purpose it shall have access to all public offices and their files, to establishments, enterprises or institutions in which the State, the Departments or the Municipalities participate, and to the offices and domiciles of banking institutions and of all other individuals or organizations for the sole purpose of searching for evidence. It may likewise request authenticated copies of the documents held by these entities. In the course of its administrative investigations the [Superintendency] shall take the necessary measures to: prevent that signs or traces of the act under investigation are lost, destroyed or altered; protect the instruments, elements, objects and effects of the act; find out what persons were witnesses to it; and, in general, gather the data and elements to assist in the inquiry.

d) Impose fines to those who infringe the rules under its surveillance: and

e) Send copies of the proceedings to the criminal courts when, as a result of its action there is evidence of a crime's having been committed.

Paragraph.- The documents and reports requested and secured by the [Superintendency] shall be treated as confidential, as determined by the law in such cases.

Article 218.- The [Superintendency] and the officials of the [Superintendency] shall undertake the search, investigation and other work to which the foregoing Article refers and shall perform the other functions therein set forth.

The [Superintendent] may commission officials of the judicial or executive branches for the undertaking of investigations, the carrying out of proceedings and the collection of evidence. These officials shall exercise the powers granted to them in the commission document.

In all cases, it shall be the duty of the [Superintendent] to impose the penalties established in Article 220 below.

Article 219.- The officials of the [Superintendency] of Exchange Control may be freely appointed and removed and hence they do not belong to the civil service. The Government shall determine their remuneration taking into account the responsibilities of their positions.

The President of the Republic shall appoint the [Superintendent], Secretary General and the Head of the Investigations Division; The [Superintendent] shall appoint the other officials of the [Superintendency] with the approval of the Minister of [Economic] Development.

Article 220.- Any violations of the rules on gold and foreign exchange control shall be penalized with fines imposed by the Superintendent of Exchange Control in favor of the National Treasury.

Article 221.- The amount of the fines to which the preceding Article refers shall be for up to 200% of the value of the proven transaction and shall be adjusted to the circumstances surrounding the infringement.

Any person or entity who has previously been fined by the [Superintendency] shall be penalized with the maximum fine.

If the fine is not paid within five days following the notice of the Resolution imposing the fine, or if no direct appeal is filed within the same term or within the five days following the resolution of the appeal, the fine shall be converted to arrest at the rate of one day for every thirty pesos, but the arrest may not exceed two years.

Article 222.- Investigations for possible violations of the rules under the [Superintendency's] supervision shall be started on the [Superintendency's] own initiative or on the basis of information given or complaint filed. Once the investigation is concluded, the party concerned shall be served a copy of the minutes of the investigation so that within the five following days he may answer the charges and request any evidence believed desirable.

If the evidence requested proves to be relevant, it shall be verified within the term determined by the [Superintendent], which term may not exceed thirty days plus any allowance for traveling time.

The evaluation of the evidence shall be made according to the importance attached to it by the Code of Penal Procedure.

Article 223.- On expiration of the term for producing the evidence, the [Superintendent] shall pass judgment by a reasoned Resolution, copy of which will be served on the infringer in the manner provided by Decree 2733 of 1959.

Against this Resolution only a direct appeal may be filed; once the appeal is gone through the government proceedings [it]shall be understood to have been exhausted and the Resolution may be brought up before the Court of Administrative Law, without appeal, should the fine amount to thirty thousand pesos or less, or, before the State Council, if it amounts to more.

The Council of State or the Court shall reject any complaint not accompanied by the receipt of payment of the fine, if this has not been converted to arrest; in case of arrest the complaint must be accompanied by proof that it is being served.

Article 224.- If during the investigation the supposed infringer cannot be found, he shall be summoned by an edict posted for ten days at the office of the secretariat. On completion of this term and in the absence of the accused, a court-appointed defender will continue the proceedings until the end.

Article 225.- The [Superintendent] may impose successive fines for up to twenty thousand pesos on persons or entities who refuse to produce accounting records and other documents requested for the investigations to which this Decree refers. Any one who fails to give information or to appear as a witness shall likewise be subject to fine.This fine shall be imposedtaking into account the seriousness of the occurence [sic] and the need for the respective evidence.

No. 84-142

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS [$250,000.00] MORE OR LESS,

Defendant,

and

THE STATE OF NEW YORK,

Defendant-Appellee,

and

REPUBLIC OF COLOMBIA,

Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,

Defendant-Appellant-Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD S. RUDOFSKY
Zane and Rudofsky
One Rockefeller Plaza
New York 10020
(212) 245-2222

Counsel for Respondent
Jose A. Fonseca

August 27, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS.

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS [$250,000.00] MORE OR LESS,

Defendant,

and

THE STATE OF NEW YORK,

Defendant-Appellee,

and

REPUBLIC OF COLOMBIA,

Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,

Defendant-Appellant-Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

Colombia's certiorari petition is baseless and should be summarily denied by the Court. Accordingly, respondent respectfully submits this short form memorandum in opposition to Colombia's petition.

Short Form Argument in Opposition to Certiorari

The argument that the Court of Appeals has "closed" the United States Courts to Colombia is frivolous. The carefully

worded Court of Appeals opinion *expressly permits Colombia* to "seek whatever redress it believes appropriate in the proper forum" and *disapproves only the misuse and abuse of federal discovery procedures:* " . . . Columbia . . . may not seek to develop the facts it needs to prove its case by use of *discovery* in the Courts of the United States." Petition at A-11 (emphasis added). This language is especially precise, narrow and clear in the context in which it appears, *i.e.*, the opinion read as a whole and with reference to *United States v. Dunbar*, 502 F.2d 506 (5th Cir. 1974).

Underscoring the frivolousness of Colombia's arguments in this regard is its July 20, 1984 *motion to intervene in Fonseca's mandamus action, Fonseca v. Regan*, 78 C 1907 (E.D.N.Y.), now once again pending before the District Court on remand from the Court of Appeals. *See*, Petition at 8, n.5. The conclusion is inescapable that even Colombia itself does not believe its own argument that the Court of Appeals has "closed" the United States Courts to it. Moreover, the *remand* of the related mandamus action (consolidated on appeal to the Court of Appeals with the interpleader action in which Colombia presently seeks certiorari), together with Colombia's pending motion to intervene in that action, make it clear that review by this Court (even if otherwise justified, which it is not) is *premature* and should await the final determination of Colombia's intervention motion and the mandamus action. *See, Andrews v. United States*, 373 U.S. 334, 340 (1963); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 72 (1948); *Collins v. Miller*, 252 U.S. 364, 370-71 (1920).

Likewise totally devoid of merit is Colombia's argument that the Court of Appeals disregarded treaty obligations between the United States and Colombia. To the contrary, while the Court of Appeals was careful to expressly acknowledge that "Colombia may have a valid action against Fonseca [in a proper forum] for exporting currency in violation of its currency exchange laws", it correctly characterized Colombia's treaty claims as having "no merit". Petition at A-10, A-11. Article VII, Section 2, of the IMF Articles of Agreement (the

Bretton Woods Agreement), upon which Colombia relies (Petition at 3), applies *only* to "*Exchange contracts* which involve the currency of any member and which are contrary to the exchange control regulations of that member . . . " (emphasis added). There is, however, simply *no* "exchange contract" involved in this case, nor has any court or commentator ever suggested (as Colombia nevertheless here contends *ipse dixit*) that a *baggage claim check** constitutes an "exchange contract" within the meaning of the Bretton Woods Agreement.

Colombia's arguments vis-a-vis the abusive interpleader and discovery practice by the United States and Colombia in the District Court, strongly disapproved of by the Court of Appeals, are equally baseless. The Court of Appeals determination in these regards is squarely and uniformly supported by a long line of lower federal appellate and district court decisions. *See, Dunbar v. United States*, 502 F.2d 506 (5th Cir. 1974); *see, also, United States v. One Residence, etc.*, 603 F.2d 1231, 1234 (7th Cir. 1979), *United States v. Palmer*, 565 F.2d 1063, 1065 (9th Cir. 1977), *Ferris v. United States*, 511 F.Supp. 795, 797 (D. Nev. 1981), *Ferris v. United States*,

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* Colombia's claim that the record does not contain a copy of the baggage claim check was properly rejected by the Court of Appeals. It has never been disputed that respondent presented the proper claim check stub and accurately described the suitcase and its contents. Petition at A-9. Moreover, page 130a of the Joint Appendix plainly displays a copy of respondent's "Passenger Ticket and *Baggage Check*" (emphasis added).

Furthermore, Colombia's marginal assertion that respondent relies on the "enforceability" of the "Fonseca/Avianca contract", Petition at 5, n. 2, is inaccurate at best. Colombia's reference is to respondent's analysis below of *Colombia's* claim-in-interpleader, *not* to a statement of the basis for *respondent's* claim, which was summarized in his main Court of Appeals brief, at 17, as follows: "the combination of Fonseca's baggage claim check, his sworn affidavit, and his compliance with all applicable Customs regulations."

501 F.Supp. 98, 101 (D. Nev. 1980), *United States v. Ortega*, 450 F.Supp. 211, 212 (S.D.N.Y. 1978). Colombia cannot avoid application of these precedents to it, especially in light of the explicit requirement of the Treaty of Peace, Amity, Navigation and Commerce between the United States and Colombia (December 12, 1846, United States-Colombia, 9 Stat. 881, T.S. No. 54, 6 Bevans 868) that Colombia may seek recourse in the Courts of the United States only "on the same terms which are usual and customary with the natives or citizens of the country." (Petition at 2.)

CONCLUSION

Colombia's certiorari petition, seeking discretionary review of the well-reasoned opinion of the Court of Appeals in this case (which adopted and applied the rule of *Dunbar v. United States, supra*, to this case), is meritless and should be summarily denied by the Court. Moreover, and in any event, the petition is premature in light of the remand of the related mandamus action and Colombia's pending motion to intervene in that action.

WHEREFORE, respondent respectfully urges the Court to deny the petition of the Republic of Colombia for a Writ of Certiorari in this case.

Respectfully submitted,

EDWARD S. RUDOFSKY
Zane and Rudofsky
One Rockefeller Plaza
New York 10020
(212) 245-2222

Counsel for Respondent
Jose A. Fonseca

August 27, 1984

No. 84-142

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS [$250,000.00] MORE OR LESS,

Defendant,

and

THE STATE OF NEW YORK,

Defendant-Appellee,

and

REPUBLIC OF COLOMBIA,

Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,

Defendant-Appellant-Respondent.

MEMORANDUM OF RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

EDWARD S. RUDOFSKY
Zane and Rudofsky
One Rockefeller Plaza
New York 10020
(212) 245-2222

Counsel for Respondent
Jose A. Fonseca

September 11, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS.

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and

THE STATE OF NEW YORK,

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REPUBLIC OF COLOMBIA,

Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,

Defendant-Appellant-Respondent.

MEMORANDUM OF RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

Respondent in the above-entitled case files this memorandum to advise the Court of certain facts which, in respondent's view, render the cause *moot.*

The funds previously in question were delivered to respondent's attorneys and disbursed pursuant to a written Stipulation of Settlement and Dismissal and Release between respondent and the United States of America, dated September 7, 1984, settling the mandamus action previously commenced by respondent (*Fonseca v. Regan, etc., et al.,* No. 78 Civ. 1907, EDNY). A conformed copy of the Stipulation was previously

filed with Mr. Justice Marshall in opposition to petitioner's untimely September 7, 1984 stay application, which was denied.

The immediate transfer of funds, agreed to by the United States and expressly directed by the District Court pursuant to the mandate of the Court of Appeals, was completed on September 7, 1984.

Petitioner has previously *conceded* (at paragraph "6" of its unsuccessful September 7, 1984 stay application) that "if the money is turned over to Fonseca's counsel, *the subject of the certiorari petition will have disappeared, and the rights of Colombia [will have been] defeated. . . .* " (Emphasis added.)

In light of the foregoing, it is undisputed that the certiorari petition, at best, presents abstract questions of law. There is no longer any *res* to be interpled, and the judgment of this Court, even if in Colombia's favor, could not grant petitioner effective relief with respect to a fund of money, previously in question, but which no longer exists.

Put most simply, changed circumstances have terminated the litigation and rendered it academic, eliminating any case or controversy. Accordingly, the jurisdiction of this Court to entertain Colombia's petition has ceased and the petition should be denied. Stern & Gressman, *Supreme Court Practice*, at ¶18.1, p. 884 *et seq.* (5th Ed. 1978).

Respectfully submitted,

EDWARD S. RUDOFSKY
Zane and Rudofsky
One Rockefeller Plaza
New York 10020
(212) 245-2222

Counsel for Respondent
Jose A. Fonseca

September 11, 1984

CORRECTED COPY

No. 84-142

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS [$250,000.00] MORE OR LESS,
Defendant,

and

THE STATE OF NEW YORK,
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Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,
Defendant-Appellant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF

JOHN CAREY
COUDERT BROTHERS
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New York, New York 10166
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Counsel for Petitioner
Republic of Colombia

September 18, 1984

TABLE OF AUTHORITIES

No. 84-142

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
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Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,
Defendant-Appellant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF

Colombia's certiorari petition is not moot, as suggested in Fonseca's September 11, 1984, Memorandum. *Levinson v. United States et al.*, 258 U.S. 198 (1922), disposed of that contention on

similar facts. Nor is the petition, as claimed in Fonseca's Memorandum of August 27th, "premature" by reason of Colombia's motion (denied on September 7th) to intervene in Fonseca's mandamus action, which action is not before this Court.

There was more that occurred in the District Court on September 7th besides the delivery of funds to Fonseca described in his September 11 memo. In addition, the Court not only denied Colombia's motion to intervene but also denied its motion to stay enforcement of the July 31st judgment dismissing the Government's interpleader action, which is before this Court.

Rather than awaiting entry of a judgment in the mandamus action compelling delivery of the funds to Fonseca, which was all that was required of the U.S. Attorney by the Second Circuit's direction to "reinstate Fonseca's complaint" and "for further proceedings consistent with this opinion", Petition at A-3, A-11, the U.S. Attorney on September 7th signed a stipulation calling for immediate delivery of the $250,000 to Fonseca counsel. The stipulation was immediately signed by Judge Costantino on September 7th.

Had a judgment been entered, the ten-day waiting period for enforcement provided by Fed. R. Civ. P. Rule 62(a) could have given Colombia more opportunity to seek a stay for the second time from the Second Circuit or for the first time from the Supreme Court. The choice of a stipulation instead of a judgment deprived Colombia of this opportunity. At the same time, any such stay was far from assured, as shown by Justice Marshall's denial of Colombia's September 7th stay application.

The U.S. Attorney's haste to acommodate Fonseca counsel contrasts sharply with the Solicitor General's caution shown by his letter of August 31, requesting additional time to respond and including the following paragraph:

> Because the Government is merely a stakeholder in this action, whose interests are only indirectly implicated by the certiorari petition, the Government

> may ultimately waive its right to respond. Portions of the certiorari petition, however, raise questions of international law requiring further study. The additional time is needed to complete our study of these questions and to prepare a response if it appears that the submission of our views is warranted.

The thirty days requested by the Solicitor General to study "questions of international law" raised by Colombia's certiorari petition were granted, to and including October 1, 1984. The Solicitor General has ample interest, beyond that of a mere stakeholder, in clarifying not only the international law issues but also the questions of when the United States may properly use interpleader and when any party may properly ignore court-ordered discovery as Fonseca repeatedly did.

The U.S. Attorney's haste may perhaps be understood in light of Fonseca counsel's August 29 Motion for Attorneys Fees and Expenses "in an amount not less than $25,000.00." The motion, returnable September 28th, was against both the U.S. Government and Colombia, relying as to the former on 28 U.S.C. § 2412. Portions of the supporting Declaration follow:

> 4. In addition, a Stipulation is presently being negotiated between Fonseca and the government to provide for the return of Fonseca's funds to him. Should said Stipulation be executed and "So Ordered", Fonseca may voluntarily withdraw the portion of his motion herein which seeks attorneys' fees and costs from the government.
>
> * * *
>
> 6. The bad faith and oppressive conduct of the government herein is set forth by the United States Court of Appeals for the Second Circuit in its opinion in this matter, dated May 17, 1984, which specifically

> held that the government's conduct in this case was "wholly unjustified" having "initiated its interpleader action on a wrong legal premise" and having "wrongly instituted it against a legitimate claimant." Slip. Op. 3751, at 3763.

Paragraph 4 thus explicitly proposes to drop the fee demand as to the Government if a stipulation giving Fonseca the funds is signed. The stipulation approved by Judge Costantino on September 7th did call for dismissal of Fonseca's mandamus action "without costs or attorneys fees" and released all other related claims against the United States and its agents.

Whatever its cause, the hasty delivery of funds to Fonseca counsel, by stipulation instead of after judgment, ended Fonseca's mandamus action but in no way affected Colombia's certiorari petition asking for review in the interpleader action. In *Levinson v. United Staes et al., supra*, the Government had similarly used interpleader to settle competing claims to property but turned the property over to one claimant after the Court of Appeals held in that claimant's favor. The Supreme Court rejected a suggestion that the other claimant's appeal was so easily mooted. The delivery, said Justice Holmes, "was a further departure from the position of stakeholder assumed by the United States but it cannot affect the decree to be entered upon its [interpleader] bill." 258 U.S. at 202.

The atmosphere has changed now that Fonseca counsel have received the $250,000 in U.S. currency which their pleadings say Fonseca smuggled out of Colombia without the Banco de la Republica permit required by that country's exchange control laws. No longer can counsel complain that the U.S. Government, by using interpleader, is oppressively withholding possession. But now the claims of Colombia must be considered, (a) for $250,000 in U.S. currency (in return for the equivalent in pesos) to add to its foreign exchange reserves, or at least (b) for reversal of the Second Circuit's decision enabling Fonseca's violation of Colombia's exchange control laws to succeed.

If Fonseca has by now conveniently (for him) dissipated the smuggled bills, other bills will suffice for either purpose. At the

same time, this Court should also reverse the Second Circuit's holding that the U.S. Attorney misbehaved in using interpleader and its holding that a party can disobey court-ordered discovery with impunity.

CONCLUSION

The writ of certiorari should issue to review the decision of the Second Circuit dismissing the U.S. Government's interpleader and excluding the Republic of Colombia from the Courts of the United States.

Respectfully submitted,

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Republic of Colombia

September 18, 1984

No. 84-142

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS.

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS [$250,000.00] MORE OR LESS,

Defendant,

and

THE STATE OF NEW YORK,

Defendant-Appellee,

and

REPUBLIC OF COLOMBIA,

Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,

Defendant-Appellant-Respondent.

RESPONDENT'S REPLY MEMORANDUM (MOOTNESS)

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Counsel for Respondent
Jose A. Fonseca

September 26, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS [$250,000.00] MORE OR LESS,

Defendant,

and

THE STATE OF NEW YORK,

Defendant-Appellee,

and

REPUBLIC OF COLOMBIA,

Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,

Defendant-Appellant-Respondent.

RESPONDENT'S REPLY MEMORANDUM (MOOTNESS)

Respondent hereby responds to petitioner's Supplemental and Reply Brief dated September 18, 1984 (as corrected):

1. Contrary to petitioner's reckless assertion, the Solicitor General does *not* have "ample" or even *any* "interest" in this matter. By notice dated September 18, 1984, the Solicitor General *waived* the Government's right to respond to Colombia's petition, clearly signalling either or both the frivolousness of the petition or its mootness.

2. Colombia conveniently ignores its own *express concession of mootness* at ¶"6" of its unsuccessful September 7, 1984 stay application, to the effect that "if the money is turned over to

Fonseca's counsel, *the subject of the certiorari petition will have disappeared, and the rights of Colombia [will have been] defeated. . . .* " (Emphasis added.)

In light of the settlement of the mandamus action, respondent no longer has any legally cognizable interest in whether Colombia prevails on its interpleader claims against the Government. Accordingly, the case at bar presents a clear illustration of the situation which arises when, as a result of an intervening change of circumstances, there are no longer adverse parties with sufficient legal interest to maintain the litigation, thereby rendering the issues non-justiciable and *moot. County of Los Angeles v. Davis,* 440 U.S. 625 (1978); *Powell v. McCormack,* 395 U.S. 486 (1969); *Mills v. Green,* 159 U.S. 651 (1895).

As held over eighty-five years ago in *Mills v. Green, supra,* it is "the duty of this Court, as of every other judicial tribunal, . . . to decide actual controversies by a judgment which can be carried into effect, and not give opinions upon moot questions or abstract propositions or to declare principles or rules of law which cannot affect the matter in issue in the case before it." 159 U.S. at 653.

The case of *Levinson v. United States,* 258 U.S. 198 (1921), relied upon by petitioner, has never been recognized as an exception to the principles of mootness uniformly articulated by this Court over the years. Instead, *Levinson* has properly rested on its own peculiar facts, most importantly the circumstance that the interpled property was conveyed to the adverse claimant pursuant to the Order of the Court of Appeals reviewed by this Court, so that upon reversal of the intermediate appellate judgment this Court (and the lower courts) retained the power, in equity, to vacate and set aside mistaken acts done in conformity with the reversed Order.

Here, however, this is simply not the case. The Government has turned the disputed funds over to petitioner in settlement of the mandamus action. This action, *Fonseca v. Regan,* No. 78 Civ. 1907 (E.D.N.Y.), is *not* before this Court, the time for Colombia to seek certiorari with respect to the Court of

Appeals Order in the mandamus action has *expired*, and a reversal of the Court of Appeals Order in the interpleader action would have absolutely *no effect* on the settlement and voluntary dismissal of the separate, non-consolidated mandamus action between respondent and the Government.

There thus clearly no longer exists any case or controversy for this Court to adjudicate. Accordingly, the jurisdiction of this Court to entertain Colombia's petition has ceased and the petition should be dismissed (or denied) as *moot*.

Respectfully submitted,

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September 26, 1984